VOL. XVIII. **1895.**

THE

MYSORE LAW REPORTS.

CONTAINING

CASES DETERMINED BY THE

CHIEF COURT OF MYSORE,

THE COURT OF THE JUDICIAL COMMISSIONER

OF COORG

THE COURT OF THE BRITISH RESIDENT

IN MYSORE.

EDITED BY

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JUDGES OF THE CHIEF COURT.

CHIEF JUDGES:

T. R. A. Thumboo Chetty.
J. W. Best.

JUDGES.

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C. Meenacshaya.

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THE

MYSORE LAW REPORTS.

APPELLATE CIVIL.

Before Rajah Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

APAJIA AND ANOTHER (DEFENDANTS 2 AND 4) *v.* D. BEERA GOWDA AND OTHERS (PLAINTIFFS).* 1894 *Sept. 29.*

Jurisdiction of Civil Courts—Pujari Rights—Code of Civil Procedure (Act XIV of 1882), s. 11—Muzaroi Department—Chief Commissioner's Notification dated 26th October 1854.

Held by the Full Bench (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J., KRISHNA MURTI, J. *dissenting*) that the Notification of the Chief Commissioner of Mysore issued on the 26th October 1854 not having been cancelled or repealed sufficed to vest in the Revenue officers managing Muzaroi affairs the sole control and decision of all disputes relating to *pujari* rights and under the provisions of s. 11 of the Civil Procedure Code (Act XIV of 1882) the jurisdiction of the Civil Courts in such matters is excluded, even as regards *pujaris* of private temples which are not Government institutions and which are not under the management of the Government Muzaroi Department.

Mr. *S. Ramaswamier* for the appellants.

Mr. *S. Narayana Rao* for the Respondents.

The Order of the Chief Court (Division Bench) was as follows:—

THUMBOO CHETTY, *C. J.*—In the case of *Chenna Gowda* v. *Nunjummah*(1) it was held that be-

* Appeal from appellate decree No. 105 of 1893-94, against the decree of Mr. C. Cress, District Judge of Mysore, in appeal No. 178 of 1893, dated the 15th day of January 1894, modifying the decree of Mr. C. B. Seshagiri Rao, Munsiff of Mysore, in O. S. No. 565 of 1892, dated the 15th day of May 1892.

(1) 5 M. L. R., 84.

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1894

APAJIA v. BEERA GOWDA.

tween 1834 and 1856, the Sole Commissioner of Mysore, under the powers vested in him by the Government of India had power to issue orders for the establishment of Courts of Justice in Mysore with Rules for their guidance. The Rules and Circulars which had been reported to the Government of India in 1855, as forming the system of judicial administration, were compiled and printed in 1860, and they contain among others, orders defining and declaring the jurisdiction of the courts.

At p. 67 of the said compilation of Circular Orders to Civil Courts, the following appears:—

"The institution of suits for *pujari* rights in the courts is prohibited. (*Mirasi* rights of village servants, 9th September 1835; *Pujari* rights, 26th October 1854). The Amildars may enquire into such disputes with a *punchayet*, and decide them, and those decisions may be appealed against to the Commissioner under whom the *muzaroi* affairs are managed."

Following the above decision it was held that the Notifications of the Commissioner in 1835 with regard to *mirasi* and hereditary rights of Shanbogues and Patels were not repealed when the Code of Civil Procedure was introduced into Mysore, and that suits relating to such rights were not cognizable by the civil courts. See *Bore Linga Gowda* v. *Sidda Rama Gowda*(1).

In the case of *Thimarajaya* v. *Payannah and others*(2) there was a claim to establish the plaintiff's right to perform *puja* in a temple and it was held that the plaintiff failed to prove such hereditary *huk* as

(1) 7 M. L. R., 125. (2) 8 M. L. R., 81.

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1894

APAJIA v. BEERA GOWDA.

was alleged. The question whether the civil courts' jurisdiction was not barred by the Commissioner's Circular of the 26th October 1854, was neither raised nor considered.

Runga Raghavendra and another v. *Sebee Narasappa*(1) was a suit to establish the plaintiff's right to perform *puja* by turns and to recover damages and it was held, on a consideration of s. 11 of the Code of Civil Procedure and ss. 88, 220 and 221 of the Land Revenue Code and of Act XXIII of 1871, that as the temple was not a Government institution under the management of the Government Muzaroi Department, the claim was within the cognizance of the civil courts. The question whether the Notification of the Commissioner in 1854 was a bar was not considered in the above case, or in a later reference from the Munsiff of Nanjangud.

In the present second appeal the question whether the civil courts have jurisdiction is raised.

I would re-post the case before the Full Bench for consideration as to whether the notification of the late Chief Commissioner dated the 26th October 1854, which takes away the jurisdiction of courts in all claims relating to *pujari* rights, applies to *pujaris* of private temples, which are not Government institutions, and which are not under the management of the Government Muzaroi Department, and whether the cognizance of the present suit by the civil courts, either in whole or in part, is barred by the said Notification.

RAMACHENDRA IYER, *J.*—I concur in the Order made by the Chief Judge.

(1) 14 M. L. R., 140.

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1895 Feb. 15.

APAJIA v. BEERA GOWDA.

The Full Bench (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) delivered the following Judgments :—

THUMBOO CHETTY, *C.J.*—The reasons for this reference to the Full Bench are fully stated in the order dated the 29th September 1894. It was there shown that, in the cases heretofore decided by this court relating to *pujari* rights, the question, whether the notification of the Commissioner, dated the 26th October 1854, which, under the ruling of this court in *Chenna Gowda* v. *Nunjumma*(1) had the force of law, was a bar to the entertainment of such suits in the civil courts, was not considered.

It was argued by Mr. Narayan Rao for the plaintiffs, that that notification was virtually repealed when the Code of Civil Procedure was introduced into Mysore in 1869. I am of opinion that this contention is untenable.

By notification of the Government of India in the Foreign Department, J. No. 47, dated the 25th March 1869, certain portions of Act VIII of 1859 were declared to have the force of law in Mysore, and, with the sanction of the same Government, certain revised Rules of Civil Procedure were promulgated with the Chief Commissioner's notification, dated the 13th April 1869. In lieu of section 1 of Act VIII 1859, which was excepted in the notification of the 25th March 1869, para. 4 of the Rules dated the 13th April 1869 provided that "with the exception of suits cognizable only by the Inam Superintendent, by the Revenue Courts, or by a Court of Small Causes, the Civil

(1) 5 M. L. R., 84.

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Courts shall try and determine all suits of a Civil nature." * * *

Act X of 1877 came into operation in Mysore from the 1st June 1878. *Vide* Government of India notification No. 47J, dated the 27th May 1878. The notification of the 25th March 1869 was cancelled with effect from the 1st June 1878.

Act XII of 1879, an Act to amend the Code of Civil Procedure, was extended to Mysore by Government of India notification No. 320 I J, dated the 19th November 1879.

By Regulation II of 1884, passed by His Highness the Maharaja, the Code of Civil Procedure, Act XIV of 1882, in supersession of Act X of 1877, as amended by Act XII of 1879, was introduced into Mysore on the 1st July 1884, from which date the notifications of the Government of India F. D. No. 47 J, dated the 27th May 1878 and No. 320 I J, dated the 19th November 1879, were cancelled.

In none of the notifications referred to above, and issued subsequent to the Chief Commissioner's notification of the 13th April 1869, was the notification of 1854, prohibiting civil courts from taking cognizance of suits relating to *pujari* rights, expressly repealed or cancelled.

Section 11 of the present Code of Civil Procedure runs thus :—

"The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force."

If the notification of 1854 was not cancelled by

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No. 4 of the Rules of the 13th April 1869 and if the Revenue Courts on the Muzaroi side were alone competent to try suits relating to *pujari* rights, it is clear that the notification of the 26th October 1854, is still in force, and a bar to civil courts entertaining suits of the kind therein mentioned.

It is conceded that suits cognizable by the revenue courts were expressly taken out of the cognizance of civil courts by No. 4 of the Rules of the 13th April 1869, and it is further conceded that that rule was not repealed, when s. 11 of the present Code of Civil Procedure was applied to Mysore; the only question, therefore, to be decided is, whether the Revenue Courts, both prior and subsequent to the Commissioner's Notification of the 26th October 1854, exercised jurisdiction in regard to suits connected with *pujari* rights. The history (*vide* Collection of orders and correspondence relating to the Muzaroi Department contained in the Muzaroi Memorandum printed by Government) of the Muzaroi Administration of Mysore shows that, from the commencement, the management of all affairs connected with Hindu temples, which enjoyed land or money *inams* or *tasdiks* of any kind, vested in Government.

In 1788, Tippu Sultan issued a Circular Order to the Amildars, Sheristadars, &c., of Taluks, enjoining a strict supervision of temple affairs.

Both the Amildar and Fouzdar (who were Revenue Officers) managed the Muzaroi affairs under the orders of Dewan Purniah.

After the British Government assumed charge of the administration of Mysore, the temple affairs were looked after by Revenue Officers, subject to the

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orders of the Commissioner or Chief Commissioner, with whom rested, as representative of the sovereign, the power of sanctioning the election of a successor to a *mutt* or a deceased Guru.

The Superintendents of Divisions, subject to the general control and sanction of the Chief Commissioner, regulated, through Amildars and other Revenue Officers and *punchayets*, Paditara (allowance in money or food); Deparadhane (lighting); Santarpane (feeding); and Naivadya (offerings), in temples.

On the 11th February 1852, the Chief Commissioner directed that the management of the affairs of *devasthanams* and *chattrams* throughout Mysore, should be transferred to, and placed under his orders, and issued new Rules for the guidance of Amildars, to exercise greater efficiency in the superintendence of temples. The Amildars were empowered to enquire into malpractices and offences committed by temple servants, and to submit proceedings, in certain cases, to the Chief Commissioner. It was after several years management of muzaroi affairs connected with temples, that the Chief Commissioner issued, on the 26th October 1854, the circular now in question, prohibiting the institution of suits for *pujari* rights in civil courts.

On the 23rd February 1861, the supervision of *Devasthanams* was transferred from the Chief Commissioner's Huzur Cutcherry to Superintendents of Divisions.

In 1865, Mr. Bowring, the then Chief Commissioner, in writing to the Government of India, observed that the direct supervision of temple endow-

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ments rested with Government, and was inseparable from a Hindu State like Mysore.

In 1867, the Muzaroi Department was placed in charge of a Hindu assistant, in each District, in accordance with orders received from the Government of India, an arrangement which is still in force.

In 1873, it was decided that the Muzaroi Officer should be regarded as the responsible, supervising and controlling authority of such institutions, his proceedings being subject to review by his official superiors (the Deputy Commissioners) in case of their being questioned or appealed against, his powers not of course extending to matters with which the Civil Courts were alone competent to deal, such as recovery of money or rent due to temples on bonds &c., but simply to the exercise of an authoritative control over theadministration of the funds assigned for the service of those institutions, and the performance of services for which such endowments were originally granted.

In 1877, a question arose whether, in the case of the temple at Mahishi, which had Inam land granted by Government, but which was not under the Muzaroi Officer's management, the Amildar had control over the archik and other temple servants, and was competent to fine them for misconduct, and it was decided by Government that, considering the object with which the lands were granted in Inam to the temple, it should be brought under the control of the officers of the Government and that mere irregularities or dereliction of duty should be restrained, without recourse to threat of resumption of the endorsement. The Muzaroi Officer was further empowered to fine

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any member of the Muzaroi Establishment, for misdemeanor or irregularities which do not require severer notice, within a limit of Rs. 5, in each instance, the order being subject to reversal by the Deputy Commissioner, on appeal.

It will be seen, from the foregoing brief summary of the orders issued, from time to time, that the Revenue Officers (Amildars, Assistant Commissioners and Deputy Commissioners) had the management and control of all temples (private or public) which enjoyed any Inam from Government either in land or money, and that their orders were subject to revision by Government. Questions relating to successions to *mutts* and *pujari* rights, were also entrusted to the Muzaroi officers for decision subject to appeal to Government. These questions were decided by Revenue officers in their capacity as Muzaroi officers, and the jurisdiction of civil courts, in respect to matters which were within the cognizance of Revenue officers, was expressly taken away by Rule 4 of the Rules of Civil Procedure, dated 13th April 1869. The Circular of 1854 has not been modified, repealed or withdrawn, subsequent to the introduction of Act VIII of 1859, or the Acts amending the same; and, therefore, Revenue officers entrusted with the management of Muzaroi affairs, sitting as Revenue Courts, are alone competent to enquire into and decide suits relating to *pujari* rights.

The expression "Revenue Courts" used in No. 4 of the Rules of the 13th April 1869 included Muzaroi Revenue officers as well as other Revenue officers, and, in this view, I am disposed to hold that the present

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suit, in which the plaintiffs seek to establish their right to the office of *pujari* of Kalabeeramma's temple and to restrain the defendants from performing puja, &c., in the said temple, is not cognizable by the civil courts. It is a matter for decision by the Revenue Muzaroi Department of Government, under the Circular of the 26th October 1854. The temple enjoys an Inam land granted by Government, and though a private temple, it must be regarded as under Government management, within the meaning of para 2 of the Proceedings of the Chief Commissioner, General Department No. 1581/G41 dated the 16th May 1877. In this view also the civil courts have no jurisdiction. See *Ranga Raghavendra and another* v. *Sebee Narasappa*(1).

The plaintiffs must establish their right as *pujaris* in the Revenue Muzaroi Courts, their claim for damages cannot be entertained by the civil courts.

KRISHNA MURTI, J.—As I understand this reference, two questions have been raised by it, *viz* :—

1. Whether the Circular order of the late Commissioner No. 30 of the 26th October 1854, has now the force of law, and is such an enactment as will restrict the operation of the Code of Civil Procedure, s. 11 ?

2. Whether it applies to Hindu Temples in Mysore which enjoy land Inams ?

With regard to the first question, it seems to me unnecessary to consider whether at the time of its issue, the Commissioner had power to issue or promulgate such a law. Granting that he was the source of all law in this Province, the question which is pertinent to this case is, whether it should be deemed

(1) 14 M. L. R., 140.

to be still in force. There is no express declaration authoritative or otherwise, to that effect, and, in the List of Enactments in force in Mysore, given by Mr. McPherson, this order has not found a place. In the heading of the List, the schedule attached to the Instrument of Rendition is referred to, and a long list follows of such laws as have not been included in the schedule. His Highness the Maharaja graciously proclaimed on the day of his accession to power that "all laws and rules having the force of law now in force shall continue to be in force." (Royal Proclamation 25th March 1881; *Mysore Gazette* April 2, 1881, Part I p. 2). *Primâ facie* the order in question had not the force of law in 1881, and there is no ground for supposing that it acquired any such force since then.

I do not think that the absence of this order from these lists is an unintentional omission. Whatever might have been the constitution of the Civil Courts of the Province and the nature and extent of their jurisdictions prior to 1869, the rules then assumed the regularity and precision of the formerly enacted codes of the British Indian Legislature for, in that year, the bulk of the provisions of Act VIII of 1859 and its amending Acts, was introduced under a set of rules sanctioned by the Government of India, and published with Government Notification of the 13th April 1869 (*Mysore Gazette* of the 24th April 1869, p. 55). Rule 4 was in the following words :—

"With the exception of suits cognizable only by the Inam Commissioner, by the Revenue Courts, or by a Court of Small Causes, the Civil Courts shall try and determine all suits of a civil nature."

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The circular order above referred to was not expressly quoted and excepted, and whether the direction contained in it was comprehended by the exception made above of "suits cognizable only by the Revenue Courts" there can be no doubt or dispute, that the circular order was, in effect and by implication, repealed by this rule. At all events, under the new rule of 1869, the bar to the jurisdiction of the civil courts created by the circular order of 1854, ceased.

It cannot be contended that the prohibition was continued by the words referring to suits cognizable by Revenue Courts. For long before the year 1869, and so long ago as June 1864, the Commissioner for the Government of the Territories of H. H. the Maharaja of Mysore, whose constitution and position with reference to the source of laws in Mysore had not undergone any change, had, through his Secretary, issued his Circular No. 522/3 (Revenue Manual p. 228) by which he "prescribed the general rules which he considers should be adopted, both with regard to the kind of cases, which are properly cognizable as *quasi-judicial* by the Revenue Courts, and to the procedure to be followed in disposing of them." In the tabular statement annexed to para. 3, "Charitable endowments" are brought under the sub-head "Original titles", comprised under "Proprietary rights", of "Regular Revenue Cases." It seems to me that the Government brought under this classification all the interest which it wanted to be reserved for its own decision. The extent of the exclusion is limited to the titles affecting "charitable endowments" and these endowments are no others than the Muzaroi

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grants either of money or of land. The Muzaroi Department has certainly a right to supervise the affairs of such institutions as enjoy such endowments, but when there is a dispute among individuals as to who has the title to the institution itself, such disputes have not been taken away from the cognizance of the civil courts. This circular order remained in force till it was repealed, in express terms, by the Land Revenue Code, but its usefulness and relevancy in this case are, that so far as the exception to the jurisdiction of civil courts was enacted by the Rule of 1869, it shows that neither the order of 1854 was continued in its effect, nor its operation included in the circular order of 1864.

That this circular order of 1864 did not go beyond questions affecting the endowments themselves, has received an authoritative decision, and this court has already acted upon it. In *Yeera Chenna* v. *Timmaiyya and others*(1) an order of Government was produced in which the Government declined to permit the division of the land, but laid down that it could "only recognize the *pujari* actually performing the duties as the person entitled to enjoy the inam attached to the temple (*Ex. D*)." Accordingly the court held that disputes relating to *pujari huks* were within the cognizance of the civil courts. This ruling does not, of course, apply to such *pujaries* as are on the establishments under the management of the Muzaroi Department and are actually paid by it. Accordingly, we find on page 12 of the Muzaroi Memorandum, that in 1873, Sir Richard Meade ruled that the powers of the Muzaroi Officer "did not

(1) 14 M. L. R., 149.

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of course, extend to matters with which the civil courts were alone competent to deal, but simply to the exercise of an authoritative control over the administration of the funds assigned for the service of those institutions, and the performance of the service for which such endowments were originally granted." I am clearly of opinion that *pujari huks*, of the kind now in dispute, were not included in the Revenue Rules of 1864, and it follows that, in the Rules of 1869, no such exceptions were continued even if they had any force under the order of 1854.

The Civil Rules of 1869 were superseded by Act X of 1877, which, without specifying the exceptions, simply enacted that "the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force" and in the present law (Act XIV of 1882) the same is repeated in the same words. It does not appear to me that it is possible to contend that the Circular Order of 1854, the operation of which had come to an end by the Rules of 1869, but which had not been expressly repealed, had its effect revived when Act X of 1877 became law in Mysore. For, under the General Clauses Act (I of 1864) which was also extended to Mysore at about the same time, it is laid down by s. 3, cl. 1, that "for the purpose of reviving either wholly or partially, a Statute, Act, or Regulation repealed, it shall be necessary expressly to state such purpose." In the absence of any such express statement it is not permitted to assume that the Order of 1854, the operation of which had ceased, was revived, on the introduction of the Act of 1877. This view receives

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support from the omission of the Order in McPherson's List, as well as explains it.

I do not think it necessary to answer the second question raised.

The suit as now laid and brought before this court falls within the cognizance of the civil courts.

RAMACHENDRA IYER, *J.*—The question is, whether the suit which was filed by the plaintiffs to establish their right as *pujaries* of a temple is cognizable by a civil court. This is not the first time that the question has been argued before us. The judgments of the court in *Bore Linga Gowda* v. *Sidda Rama Gowda*(1); *Thimarajaya* v. *Payannah and others*(2); and *Runga Raghavendra and another* v. *Sebee Narasappa*(3) followed the decisions of the Indian High Courts, and held that such suits were cognizable by civil courts. It is to be regretted that the Notifications which had been issued by the Chief Commissioner on the 9th September 1835, and the 26th October 1854, were not brought to the notice of the court on any former occasion. The point which has arisen in this case is a new one, *viz.*, whether the Notification of the 26th October 1854 bars the cognizance of the suit under s. 11 of the Code of Civil Procedure.

The Notification is as follows:—"The institution of suits for *pujari* rights in the courts is prohibited. The Amildar may inquire into such disputes with a *punchayet* and decide them, and those decisions may be appealed against to the Commissioner under whom the Muzaroi affairs are managed." The first part is

(1) 7 M. L. R., 125. (2) 8 M. L. R., 81.
(3) 14 M. L. R., 140.

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absolute in terms and prohibits civil courts from entertaining suits for *pujari* rights; and the second part provides a tribunal for the determination of such questions, *viz.*, the Government in the Muzaroi Department.

It has been held by a Full Bench of this court that the circular orders which were issued by the Commissioner have the force of law.

It is clear that the circular order was in force, and that civil courts were expected to enforce it, since it finds a place in the collection of circular orders to civil courts, which was published by Government in 1860.

The law has not been since repealed by competent authority, and so long as it remains in force, it seems to me that a suit for establishing *pujari* rights is not one of a civil nature.

It does not seem necessary to consider the constitution and powers of Revenue Courts when the Code of Civil Procedure was enacted. It may be that the rules which were made in 1864, to regulate the procedure of Revenue Courts, did not empower those courts to decide suits for *pujari* rights. Suits relating to temples were perhaps advisedly omitted from the list of suits which were made cognizable by Revenue Courts, on the ground that they were cognizable by the Muzaroi Department, and not simply by Revenue Officers. The Government in the Muzaroi Department being made the supreme authority for settlement of such disputes, and the civil courts being prohibited from taking cognizance of them, it seems to me that the present suit ought to be dismissed.

THUMBOO CHETTY, *C. J.* and RAMACHENDRA IYER,

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J.—In accordance with the opinion of the majority of the court, it is ordered that the decrees of the lower courts be reversed and the plaintiffs' suit be dismissed. Under the peculiar circumstances of the case, we direct each party to bear his own costs throughout.

Appeal allowed. Suit dismissed without costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

THIRTHA CHARI (PLAINTIFF) v. DODA BOMANI GOWDA AND OTHERS (DEFENDANTS).*

1895 *Feb.* 20.

Ejectment—Title in plaintiff—Onus—Consideration.

A suit for ejectment cannot be brought by one who has no valid title to the land in dispute; and an issue on this point should be framed in such a case.

Also, if a conveyance operates as a *bonâ fide* transfer of property it does not cease to be valid because consideration was not paid wholly or partially. The fact of payment or non-payment can only be considered for the purpose of determining whether there was a sale.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *M. D. Singarachar* for respondent No. 1.

Mr. *B. Nanjundappa* for respondent No. 4.

The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

This was an action of ejectment. The plaintiff rested his title upon a conveyance which was executed by Malliah. Defendant No. 4 who is in possession of the land denied the alleged vendor's title to convey, and she further denied that the plaintiff was a

*Appeal from appellate decree No. 125 of 1893-94, against the decree of Mr. M. Ramaswamy Iyer, Subordinate Judge of Mysore, in appeal No. 133 of 1893, dated the 19th day of January 1894, affirming the decree of Mr. B. Srinivasa Rao, Munsiff of Seringapatam, in O. S. No. 877 of 1891, dated the 19th day of June 1893.

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bonâ fide purchaser. One of the issues framed by the Munsiff was, whether the sale to the plaintiff was colorable. This was an issue which he was right in framing, because an action of ejectment ought not to be maintained by one, who had no valid title to the land in suit. The Munsiff found the issue adversely to the plaintiff, and the finding was upheld by the Subordinate Judge. If a conveyance operated as a *bonâ fide* transfer of property, it would not cease to be valid because consideration was not paid, wholly or partially. Non-payment of purchase-money may not invalidate a sale, although the fact of payment or no may be taken into consideration for the purpose of determining, whether there was a sale. What we understand by the findings of the lower courts is, that the conveyance was not intended to vest the title, if any, in the plaintiff, and that Malliah simply selected the plaintiff as a medium for carrying on a litigation, which he did not venture to carry on in his own name. The finding being sufficient to put the plaintiff out of court, we confirm the Subordinate Judge's decree, and dismiss the second appeal with costs, payable to defendant No. 4.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and C. Meenacshaya, Judge.

1895 March 6.

KALA (PLAINTIFF) v. MADA (DEFENDANT).*

Adoption—Right of widow to adopt.

A son, having died subsequent to his father, the widow of the

*Appeal from appellate decree No. 15 of 1894-95, against the decree of Mr. M. Ramaswami Iyer, Subordinate Judge of Mysore, in appeal No. 194 of 1893-94, dated the 22nd day of May 1894, reversing the decree of Mr. B. Sreenivasa Rao, Munsiff of Seringapatam, in O. S. No. 124 of 1893 dated the 1st day of September 1893.

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latter adopted a son to the father, although the deceased's natural son was grown up and married at the time of his father's decease. *Held* that she had no power to so adopt. The inheritance descended from father to son and the latter having left a widow she only was competent to adopt a son for her own husband.

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Mr. *B. Nanjundappa* for the appellant.

Mr. *C. Krishna Murti* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and MEENACSHAYA, *J.*) was as follows :—

We agree with the Subordinate Judge in his finding, that the plaintiff's adoption has not been satisfactorily established. We are further of opinion, that, even if the adoption took place as a matter of fact, it is invalid in law.

Chenna, for whom the plaintiff is said to have been adopted by his widow Kalama, had a son named Sidda. Chenna predeceased Sidda who was a grown up son, married at the time of his father's death. Sidda died some time subsequent to Chenna's death. If any person was necessary to be adopted to keep up the lineage, such adoption ought to have been made for Sidda and not for his predeceased father. The inheritance descended from father to son and the latter died leaving him surviving his own widow, who succeeded to Sidda's estate. The widow of Chenna was legally incompetent to adopt a son for her own husband under the circumstances.

It was argued that, as the widow of Sidda married another man, she had thereby forfeited her rights in her husband's estate and that the plaintiff was entitled to step in as a reversioner. This is not the ground on which the suit was brought. The plaintiff claimed as the adopted son of Chenna, father of Sidda, and as

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he failed to prove the *factum* and validity of that adoption, his present suit fails.

We dismiss this second appeal with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer, and C. Meenacshaya, Judges.

1895 March 8.

VENKATARAMANIA (1ST DEFENDANT) *v.* G. CHENNABASAPA (PLAINTIFF).*

Minority—Recital in deed—Onus—Civil Procedure Code (Act XIV of 1882), s. 232—Powers of Appellate Court.

A recital in a document cannot bind or raise a presumption against, a person who is not a party to it. So the statement in a bond that the executant was at the time a major does not cast the onus of proving the contrary on those who challenge the fact when they are strangers to the document.

Also, an appellate court has no power to interfere with orders of a lower court under s. 232 of the Civil Procedure Code or when declaring the right of an assignee to call in question the propriety of orders passed under the section.

Mr. *Nanjundappa* for the appellant.

Mr. *Ananda Rao*, *S. Sirsi* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The first point which was argued before us was, that the assignor was a minor at the date of assignment. The evidence has been carefully analysed and discussed by the Subordinate Judge, and we generally agree with his conclusion and the reasons thereof. There is, however, one argument of his which does not meet with our approval. He has remarked as follows in para 13 of the judgment:—" The bond A shows that the deceased was a major on the date that

* Appeal from appellate decree No. 48 of 1894-95 against the decree of Mr. S. R. Subbaraya Iyer, Subordinate Judge of Shimoga in appeal No. 11 of 1894-95, dated the 4th day of September 1894, reversing the decree of Mr. S. Veradaraja Iyengar, Munsiff of Shimoga, in O. S. No. 89 of 1892, dated the 20th day of March 1893.

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he executed it and the burden of proving that he was not, clearly rested on the defendant who questioned it." The argument that the judge was bound to hold that the executant was a major until and unless it was disproved by the defendant might hold good if the defendant was a party to document A. If he got an assignment and if he afterwards sought to impeach the transaction on the ground that the assignor was not qualified by age to execute it, the court might say that he was *primâ facie* bound by the recital in it and that it was his duty to displace the presumption by his evidence. A recital in a document to which he was a stranger can neither bind him nor raise a presumption against him. It was simply a piece of evidence which the Judge had to consider along with other evidence on the record. His conclusion seems to be right and we agree in holding that the executant was a major.

The appellant argued that if the assignment was to be upheld on the ground above stated, it operated to transfer the assignor's share only. We are unable to accede to this argument, inasmuch as the document did not profess to make a distinction between his share and the shares of his younger brothers. If the latter impugned the validity of the transaction, the question might arise whether the deceased brother was justified in making the alienation. So far as the judgment-debtor is concerned, he is interested in protecting himself against being harassed by the assignee on one side and the assignor's brothers on the other. That protection is assured to him by the fact that the brothers are parties to the decree which upholds the assignment.

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There is an objection which was not urged before us and which nevertheless we feel bound to notice. Para 16 of the judgment of the Subordinate Judge is as follows:—"The result is, the decree of the lower court will be reversed and the orders of dismissal passed by the Munsiff in Execution cases Nos. 383, 384 and 389 of 1891 set aside and a decree passed declaring, &c." The Subordinate Judge had no power to cancel the orders which had been passed by the Munsiff under s. 232 of the Code of Civil Procedure. When a transferee applies to a Judge to substitute his name for that of the decree-holder, the Judge has a discretion to grant or refuse the application. If an order of refusal is passed, the transferee may seek his remedy against the assignor, or may sue for a declaration of his right as assignee. If his right is declared, he ought once more to apply to the court which passed the decree under execution to permit him to execute it. The Judge who declares the assignee's right has no power to call in question the propriety of the order which was passed under s. 232. This portion of the Subordinate Judge's decree will be rescinded; the remainder of the decree is affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and C. Meenacshaya, Judge.

1895 April 8.

TOLASA BAYEE (DEFENDANT) v. KRISHNACHAR (PLAINTIFF).*

Hindu Will—Validity in Mysore—Power of alienation by devisee—Stridhana.

Although the Hindu Wills Act (XXI of 1870) is not in force in

*Appeal from appellate decree No. 23 of 1894-95, against the decree of Mr. C. Cress, District Judge of Mysore, in appeal No. 274 of 1893, dated the 22nd day of June 1894, confirming the decree of Mr. M. Ramaswami Iyer, Subordinate Judge of Mysore, in O. S. No. 66 of 1892, dated the 26th day of July 1893.

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Mysore the courts have always upheld wills in those cases in which they were in conformity with Hindu Law, that is, where the subject of devise was the self-acquired or separate property of the testator which he was competent to give away by gift or otherwise during his life-time.

***Further*, as to movables the legatee has absolute power of alienation; and as to immovables where the devise is coupled with an express power of alienation and the intention is clearly expressed in the will, no limitation can be placed on such power.**

***Also*, the persons entitled to succeed to *stridhana* after a woman's death are her own heirs and not the heirs of her husband.**

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and C. MEENACSHAYA, *J.*) was as follows :—

The deceased Subanachar, the adoptive father of the plaintiff and the husband of the defendant, bequeathed some of his properties by will to the defendant. The courts below found, as a matter of fact, that the properties so bequeathed were Subanachar's own acquisition; but in upholding the bequest, directed "that the defendant should not alienate or diminish the corpus of the immovable properties allotted to her share in prejudice to plaintiff's ultimate rights."

The present appeal by the defendant is against the restriction upon alienation thus placed by the decrees of the courts below.

Although the Hindu Wills Act (XXI of 1870), is not in force in Mysore, yet the courts in Mysore have, invariably, upheld wills in those cases in which they were in conformity with the provisions of the Hindu Law. Or, in other words, the power of bequest was allowed in those cases in which the property, the subject of devise, was the self-acquired or separate property of the testator which he was competent to give

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away by gift or otherwise during his life-time. In the present case the courts below were right in upholding the will for the reasons stated above. Now the question for decision is, whether the defendant has absolute powers of disposal over the property bequeathed to her.

That she has such power over the movables mentioned in the will, is not disputed; but, as regards the immovable property, it is argued that she cannot alienate the same to the prejudice of the reversioners.

All the authorities bearing on the question are fully discussed by Mr. Mayne in his excellent Treatise on Hindu Law and Usage, and the result is briefly embodied in s. 617, which runs as follows :—

"Immovable property when given or devised by a husband to his wife, is never at her disposal even after his death. It is her *stridhana*, so far that it passes to *her* heirs, not to *his* heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male, even though the gift is made in terms which create a heritable estate. *Of course, it is different if the gift or devise is coupled with an express power of alienation.*"

If there was merely a devise in general terms, the ordinary restriction as to alienation would apply ; but it will be seen, on a perusal of the will, that the testator has given absolute powers of alienation to the defendant. This he was competent to do, as the property bequeathed was his own acquisition which he might have, during his lifetime, absolutely given away to anybody he pleased. The several decided cases quoted by Mr. Mayne in his foot-note to s. 617,

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support the view, that where the devise is coupled with an express power of alienation and the intention is clearly expressed in the will, no limitation can be placed. Then again, treating the property given to the defendant by her husband as her *stridhana*, the persons entitled to succeed to it after her death would be her own heirs and not the heirs of her husband. In this view also the plaintiff has no *locus standi*, as he is not the heir to the defendant's *stridhana*. So much of the lower courts decrees, as restrains to the defendant from alienating the suit property, items 1 and 2, referred to in the copy of the will, must be set aside. In other respects the decrees will be affirmed.

The cross-objection of the plaintiff is allowed.

As each party was partially successful in this court, we direct each to bear his or her own costs incurred in this court.

Appeal allowed. No costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

1895 June 17.

MR. H. V. KARVE, EXECUTIVE ENGINEER, MYSORE DIVISION (DEFENDANT) v. RAMANUJA IYENGAR (PLAINTIFF).*

Damnum—Injuria—Right of action—Official acts—Error of judgment.

A sluice which brought water to a field was removed by the Executive Engineer of the Division and a three-inch pipe substituted which was insufficient for the irrigation of the field. It was not alleged that the Executive Engineer was actuated by any corrupt or unworthy motives, but only that he had committed an error of judgment which he subsequently admitted and corrected, after

* Appeal from appellate decree No. 54 of 1894-95, against the decree of the District Judge of Mysore, in Appeal No. 16 of 1894, dated the 22nd day of August 1894, confirming the decree of the Munsiff of Mysore in O. S. No. 715 of 1891.

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damage had been sustained by the owner of the field. *Held*, that there was no legal cause of action against the Engineer. A land-owner is not entitled to the services of an Executive Engineer for the purpose of providing an adequate supply of water for his field. He is appointed by the State and while acting within the province assigned to him is responsible to the State alone for any abuse of the powers it has conferred on him.

Mr. *C. Raja Rao* for the appellant.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

This was a suit for damages sustained by the plaintiff by reason of the defendant's omission to give him an adequate supply of water for cultivating his field. The plaintiff's case was that the sluice which brought water to his field was removed by the defendant (the Executive Engineer of Mysore) and a three-inch pipe was substituted for it, which did not bring sufficient water to his field and, in consequence, about half the field was left uncultivated.

The courts below did not find and indeed the plaintiff did not strenuously contend that, in substituting a three-inch pipe, the defendant was actuated by corrupt or unworthy motives. Upon certain calculations made by him, he was of opinion that a three-inch pipe would suffice for irrigating the plaintiff's field. The Revenue officers differed from him. He, however, maintained that he was right and that no alteration was needed. He subsequently found that he had made an error and substituted a larger pipe. This shows that he committed an error of judgment when he maintained that a three-inch pipe was sufficient.

The courts below found that the plaintiff did sustain loss by reason of the defendant's erroneous judgment. They were of opinion that the defendant was

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bound to make good the loss and they have awarded damages to the plaintiff.

The case involves an important question of law which has received no consideration in the lower courts. The question is, whether the defendant's act amounted to a legal injury. The suit is filed against the Executive Engineer of Mysore for a wrongful act alleged to have been committed by him in his official capacity. There was of course no contract between the plaintiff and the defendant. Does the law or the custom of the country impose a duty, apart from contract, upon an Executive Engineer, the breach of which gives a right of action to a private individual? If the defendant did not owe a duty to the plaintiff or, in other words, if the plaintiff had no right to compel the defendant to supply him with a certain quantity of water, the defendant's error of judgment or omission cannot amount in law to a "negligence" or refusal to do his duty. We have not been referred to any provision of law or to any authority which entitles a land-holder to the services of an Executive Engineer for the purpose of providing an adequate supply of water for his field. He is appointed by the State, and, while acting within the province assigned to him, is responsible to the State alone for any abuse of the powers it has conferred on him. We are of opinion that the plaintiff has not a legal cause of action against the defendant. We reverse the decrees of the courts below and dismiss the suit with costs throughout.

Appeal allowed with costs.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

1895
July 19.

CHENNE GOWDA AND OTHERS (PLAINTIFFS IN O. S. No. 63 OF 1892, AND DEFENDANTS IN O. S. No. 64 OF 1892) *v.* DEVE GOWDA AND OTHERS (DEFENDANTS IN O. S. No. 63 OF 1892, AND PLAINTIFFS IN O. S. No. 64 OF 1892).*

Jurisdiction of Civil Court—Office of Patel—Suit for Declaration.

Parties claiming to be heirs of a deceased patel were referred by the Deputy Commissioner to the Civil Court for establishment of their right. *Held*, that the object of the suit not being to enforce the plaintiffs' right to the office of patel, but to obtain a declaration upon which consequential relief might subsequently be obtained in the Revenue Court, it was cognizable by the Civil Court.

Mr. *Ramaswamier* for the appellants.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

When Patel Linga Gowda died, the plaintiffs in O. S. No. 63 and the plaintiffs in O. S. No. 64 were claimants to the office. The Deputy Commissioner of Kadur referred them to a civil suit to establish their right as the heirs of the deceased patel. The plaintiffs in each suit prayed for a declaratory decree. The courts below have found that the plaintiffs in O. S. 64 are, and that the plaintiffs in the other suit are not, Linga Gowda's heirs.

It has been argued in second appeal, that the suit was not cognizable by a Civil Court. The suit was not to enforce the plaintiffs' right to the office of patel. The object of the suit was to obtain a declaration of right, upon which consequential relief might be subsequently sought in a Revenue Court. A suit of this kind is cognizable by a Civil Court. *Kathama Natchiar* v. *Dorasinga Tever*(1).

* Appeal from appellate decree No. 157 of 1894-95, against the decree of Mr. S. R. Subbaraya Iyer, Subordinate Judge of Shimoga, in appeal No. 5 of 1894-95, dated the 15th day of January 1895, confirming the decree of Mr. J. E. Holt, Munsiff of Chickmagalur, in O. S. Nos. 63 and 64 of 1892, dated the 18th day of January 1892.

(1) I. R. 2 I. A., 182.

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We admit that the Deputy Commissioner might have disposed of the applications in any manner he thought proper; but we are not aware of any provision of the Revenue Code which prevents a Deputy Commissioner from referring rival claimants to an office to a Civil Court for an adjudication on their rights. We reject the second appeal.

Appeal dismissed.

1895 *July 24.*

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

K. SRINIVASA IYENGAR (DEFENDANT No. 1) v. SUBRAMANYA SOMAYAJE (PLAINTIFF).*

Civil Procedure Code (Act XIV of 1882), s. 244—Representative of judgment-debtor—Purchaser at court-sale.

A purchaser at court-sale of the equity of redemption of a judgment-debtor is not the latter's representative under s. 244 of the Civil Procedure Code; and is not barred from bringing a separate suit to enforce his claims.

Mr. *M. D. Narasimiengar* for the appellant.

Mr. *S. Ramaswamiyer* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

Defendant No. 2 mortgaged his *vrithy* land and other property to defendant No. 1, who put the mortgage bond in suit and obtained a decree thereon. There were other proceedings between the parties which need not be detailed here, which entitled defendant No. 1 to claim possession of the *vrithy* land. He brought a suit for that purpose, which was com-

* Appeal from appellate decree No. 65 of 1894-95, against the decree of Mr. C. Cress, District Judge, in appeal No. 91 of 1894, dated the 29th day of September 1894, confirming the decree of Mr. S. Venkatavaradan Iyengar, Munsiff of Mysore, in O. S. No. 259 of 1893, dated the 15th day of January 1894.

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promised, upon condition of defendant No. 2 paying him Rs. 500 odd.

Sometime after the date of the above mentioned mortgage, defendant No. 2 mortgaged the said *vrithy* land to the plaintiff, and also borrowed money from him on personal security. The plaintiff sued for recovery of the unsecured debt and obtained a decree, in execution whereof he purchased the right, title and interest of defendant No. 2, and got possession of the land.

Defendant No. 1 applied for execution of the decree he had obtained upon the mortgage bond, and sought to attach the land which was in plaintiff's possession. The plaintiff paid the amount of the decree, under protest, in order to save his property from being sold.

He brought a suit for the recovery of the money. His ground was that the sum of Rs. 500 odd which was paid to defendant No. 1 in accordance with the terms of the compromise, included the amount of the decree under execution, and that the application for execution was made by the decree-holder, in collusion with the debtor, with the intention of defrauding him. The courts below found that the allegation of fraud was true, and decreed the claim. Defendant No. 1 has made a second appeal on the ground that the suit was not maintainable under s. 244 of the Code of Civil Procedure.

The appellant's argument is that inasmuch as there was a decree against the *vrithy* land, and as the right of the judgment-debtor was purchased by the plaintiff, the latter was the debtor's representative within the meaning of s. 244 of the Code; and he ought to have

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represented his objection to execution under that section, and not by a separate suit.

This contention is opposed to the decisions on the point. The courts have made a distinction between one who has purchased a judgment-debtor's property at a private sale, and one who has purchased it at a court sale; and the former has been treated as a representative of the debtor for the purpose of s. 244, but not the latter. The ground of the distinction has been explained by the Judicial Committee of the Privy Council. See *Dinendronanth Sannial* v. *Ramkumar Ghose—Tarakchandra Bhutta Charjia* v. *Baikantnath Sannial*(1). Their Lordships observed:—"There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, and of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor and freed from all alienations and incumbrances effected by him subsequently to the attachment of the property sold in execution." This principle has been followed and the courts have refused to recognize purchasers at court sales as representatives of judgment-debtors. See *Goursundar Lahiri*

(1) I. L. R. 7 Cal., 107.

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v. *Hemchunder Chowdhury*(1) and *Vishvanath Charndi Naik* v. *Subraya Shivapa Shetti*(2).

The appellant's contention was, that the above mentioned decisions were overruled by the judgment of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(3). We regret that the advocate has ventured to refer us to a judgment which, it is clear, he could not have read. The first paragraph of the judgment of the Privy Council shows that the respondent before them was a decree-holder, and that the appellant was one of the parties against whom the decree under execution had been passed. The debtor's case was, that the decree-holder had got his property attached and sold by auction, notwithstanding that he had entered into an agreement to exempt the property from sale. The Privy Council held that the point which was in issue between the debtor and decree-holder ought to be determined under s. 244.

The reported decisions being adverse to the appellant's contention, we uphold the decree of the District Judge, and dismiss the appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and A. Ramachendra Iyer, Judge.

1895 August 7.

GURUNANJIA (PLAINTIFF) v. MALALI BASAPA (DEFENDANT No. 2).*

Ejectment—Title—Lease—Questions for decision.

In a suit for ejectment and arrears of rent, against a tenant who

* Appeals from appellate decrees Nos. 73, 81 and 82 of 1894-95, against the decrees of the District Judge of Nagar, in appeals Nos. 22, 11 and 24 of 1893-94, modifying and reversing the decrees of the Munsiff of Sagar, in O. S. Nos. 294, 293 and 295 of 1890.

(1) I. L. R., 16 Cal. 355. (2) I. L. R. 15 Bom., 290.

(3) I. L. R., 19 Cal., 683.

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was alleged to be holding over, the latter denied the tenancy and said he had purchased the property from a third party who was added as an additional defendant. The court of first instance found that that the plaintiff's purchase of the land was good and that the tenancy existed as alleged; but that the conveyance set up by the defendant was fraudulent, and decreed the claim. On appeal, the District Court considered that the lease set up in the plaint was not true and ordered dismissal of the suit without going into any other questions. *Held*, by the Chief Court, that the suit being for ejectment the question at issue was one of title; the lease was only one of several allegations made by the landlord to show he was owner and entitled to immediate possession. It being necessary for the question of title to be decided, the appeal was remanded for that purpose.

Mr. *S. Narayana Rao* for the appellants.

Mr. *S. Ramaswamier* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

The suit was originally filed against defendant No. 1 alone, for possession of land and rent. The plaintiff alleged that the defendant was his tenant who was holding over. The latter denied the alleged tenancy, and pleaded that one Basapa was his landlord. The latter made an application to be made a party to the suit, and he was ordered to be joined as defendant No. 2. He denied the plaintiff's title, and alleged that he had purchased the land from certain persons named by him. The Munsiff framed issues which were to the effect, whether the plaintiff or Basapa, was the owner of the land, and whether the conveyance upon which each of them rested his claim was a *bonâ fide* or colorable transaction. The Munsiff found that the plaintiff had honestly purchased the land in 1878 and got possession, that defendant No. 1 was his tenant, and that defendant No. 2's conveyance was

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dishonest; upon these findings, he directed defendant No. 1 to pay the rent claimed by the plaint, and both the defendants to restore possession.

Defendant No. 1 acquiesced in the decree. Defendant No. 2 appealed on the grounds that the plaintiff did not establish his title to the land, that the evidence was sufficient to establish his own title, and that the lease alleged in the plaint was not proved. The District Judge considered the last ground, found that the lease was not true, and being of opinion that the finding was fatal to the suit, dismissed it with costs, without discussing the evidence in regard to ownership.

The plaintiff has made a second appeal. We are of opinion that the District Judge's view was erroneous. The allegation contained in the plaint, that defendant No. 1 was a tenant holding over, was sufficient to show that the suit was for ejectment and not to enforce a lease. The plaint claimed rent for a certain period, and the produce of the land for the remaining period, thereby making it clear that the defendant's possession was wrongful and that the question which was at issue was one of title. The allegation of lease was one of several allegations made by the plaintiff to show that he was owner and entitled to immediate possession. A finding upon the question of lease or no lease was not sufficient for the disposal of the suit, for it might well be that the lease was true, and that nevertheless the plaintiff had no right to demand ejectment or possession. The question of right was one which it was necessary to determine, before a decree could be passed against defendant No. 1.

If the question of title was not involved in the suit,

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there was no apparent reason for the motion which was made by defendant No. 2 to get himself made a party. We do not agree in Mr. Ramaswamier's contention, that to give relief to the plaintiff upon consideration of the question of title, would be inconsistent with the character of the original plaint. As we have already observed, the action was for ejectment, and there certainly was no impropriety in bringing on the record, a person who claimed an interest in the land in suit, and in determining the question of title. We reverse the District Judge's decree and direct that the appeal be restored to his file to be disposed of on the merits. The costs of the second appeal will abide the result of the appeal.

This judgment governs second appeals Nos. 81 and 82.

Remanded to District Court for rehearing of appeal.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and A. Ramachendra Iyer, Judge.

1895 August 7.

VENKATRAMANAYA *alias* RAYAPA (PLAINTIFF) v. SHAMANA (DEFENDANT).*

Suit to set aside decree—Alleged fraud—False affidavit—Civil Procedure Code (Act XIV of 1882), s. 108.

Suit was brought to set aside an *exparte* decree on the ground it had been obtained by fraud. The fraud was alleged to consist of false statements made in an affidavit upon which substituted service had been granted.

Held, that if the allegations on which it was sought to have the decree set aside were true they would be good grounds for an order under s. 108 of the Civil Procedure Code; but could not be taken as sufficient to support a suit. To allow a suit to set aside a decree

*Appeal from appellate decree No. 85 of 1894-95, against the decree of Mr. C. Cress, District Judge of Mysore, in appeal No. 13 of 1894, dated the 20th day of October 1894, confirming the decree of Mr. M. Humza Hussain, Munsiff of Hole-Narasipur, in O. S. No. 207 of 1892, dated the 20th day of March 1894.

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alleged to have been obtained by perjury and so forth would be to encourage a multiplicity of suits and put an end to finality in litigation. It might be different were the defendant against whom the decree was given absolutely without a remedy; but an appropriate remedy being provided by s. 108 of the Civil Procedure Code, a separate suit could not be maintained.

Mr. *B. Nanjundappa* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

This was an action to set aside a decree on the ground that it was obtained by fraud. The plaintiff in the former suit (defendant herein) filed an affidavit that the defendant (plaintiff herein) was evading service of the summons. The Munsiff ordered substituted service. The defendant not appearing on the day fixed for trial, the Munsiff decreed the claim. Application was made for an order to set aside the *ex-parte* decree, but was rejected by the Munsiff, as it was not made within the time prescribed therefor.

The present plaintiff alleges that the affidavit which was filed in the former suit is false, that he did not evade the service of summons, that he was absent in Mysore on business, and that he had, in fact, no notice of the suit. This is the alleged fraud on which he rests his claim for cancellation of the decree. The courts below have dismissed the suit. He has made a second appeal.

If these allegations are true, we are of opinion that the plaintiff had good ground for making an application for an order under s. 108 of the Code of Civil Procedure and that they are not sufficient to maintain the suit. An order for substituted service is made by a court, after enquiry, as required by s. 82 of the

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Code. If the judge was misled by the affidavit and passed an order which he might not otherwise have passed, it was like any other order or judgment based upon false evidence. It was erroneous and liable to be set aside, under s. 108, or by a court of appeal, under s. 588. If we allow a suit to be filed to set aside a decree alleged to have been obtained by perjury and so forth, we encourage a multiplicity of suits, and there will be no finality of litigation. The observations made by Lord Justice James in *Flower* v. *Lloyd*(1) are pertinent to this case:—"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? The question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured * *. The court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation,

(1) L. R. 10 Chan, Div., 333.

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amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehood, and frauds."

Notwithstanding the weighty observations of the Lord Justice, we might be inclined to create a precedent, if we were satisfied that the plaintiff was absolutely without a remedy. An order for substituted service is not final and conclusive when it can be shown that the substituted service failed, and the proceedings were never brought to the knowledge of the defendant. The object with which s. 108 of the Code was passed, is to enable a court to give leave to a defendant to come in and defend the action, as he would have done if the substituted service had been effectual. The legislature having provided an appropriate remedy, we are of opinion that the action was not maintainable, and we dismiss the second appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C.I.E., Chief Judge and A. Ramachendra Iyer, Judge.

1895 *August* 14.

SESHACHELLA MOODELLIAR AND ANOTHER (DEFENDANTS) v. PUTANA (PLAINTIFF).*

Tort—Interference with toddy-contractor's rights—Damages.

A license to open a toddy shop in a village within a circle already granted to *A* was by mistake issued to *B* who, notwithstanding *A's* protest, opened a shop and sold toddy in the village until his license was cancelled.

Held, that there was an invasion and infringement of *A's* right with consequent loss to him caused by *B* and the proper measure of damages would be the amount received by *B* from sales of toddy

* Appeal from appellate decree No. 53 of 1894-95, against the decree of Mr. C. Cress, District Judge of Mysore, in appeal No. 309 of 1893, dated the 23rd day of July 1894, modifying the decree of Mr. M. Ramaswamier, Subordinate Judge of Mysore, in O. S. No. 77 of 1891, dated the 28th day of August 1893.

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less his expenses; so that he should be prevented from making again by his wrong. The plaintiff is not bound in all cases to prove his loss; but in cases of tort where there are aggravating circumstances damages may be awarded so as to operate as a punishment.

Mr. *C. Raja Rao* for the appellants.

Mr. *N. Cheluviengar* for the respondent.

The Judgments of the Chief Court (THUMBOO CHETTY, *C. J.* and RAMACHENDRA IYER, *J.*) were as follows:—

THUMBOO CHETTY, *C. J.*—There is a concurrent finding by both the courts below that Nadanhalli was situate within the *firka* or circle which, under the arrangement entered into between the parties, was allotted to the plaintiff. We cannot get behind this finding.

That the defendant opened a shop for vending toddy in the said village contrary to *mamul* and notwithstanding the objection of the plaintiff is also found by the courts below, as a matter of fact.

The documents filed in the case show that the license for opening the shop was granted to the defendant by mistake and was subsequently cancelled and withdrawn. Under these circumstances the courts below rightly held that there was an infringement and invasion of the plaintiff's right by the wrongful act of the defendants causing loss to the plaintiff.

The only question that remains to be decided is, what is the measure of damages to which the plaintiff is entitled. On this point there is a difference of opinion between the Sub-Judge and the District Judge. As to the sales, we think we may accept the defendants' accounts according to which, as found by the District Judge, the sales amounted to Rs. 950 and de-

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ducting therefrom 4 annas in the rupee or 25 per cent. on account of expenses as found by both the courts, the balance is Rs. 713-4-0 and not Rs. 1,051-14-0 allowed by the Sub-Judge.

In the result we agree with the decision of the District Judge and dismiss this appeal with costs.

The cross claim of the plaintiff for Rs. 386¾ disallowed by the District Judge is inadmissible for the reasons already stated. It is also dismissed with costs.

RAMACHENDRA IYER, *J.*—The appellants' advocate argued at some length that there was no evidence at all that Nadahalli was situated in the plaintiff's *firka* and that the defendant had encroached upon his right by opening a new toddy shop in that village. If the burden of proof lay upon the plaintiff, I should be inclined to concur in the appellants' argument. I think, however, that in this case the defendant was bound to prove that the village was situated within the local area which had been allotted to him. The evidence shows that the plaintiff had acquired the right to vend toddy in the Taluk of Mysore. By an arrangement subsequently made between the parties, the defendant got permission to vend toddy in certain villages in the Taluk. If there was no evidence to prove that by express contract the plaintiff was prevented from selling toddy in a particular village, we must presume that his general right was subsisting. His right as contractor for the whole Taluk being clear, it appears to me that it was not his duty to prove that he had a right to sell at Nadahalli. Although the form of the issue might be to cast upon him the burden of proving an affirmative, in substance

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it amounts to a negative proposition, *viz.*, that his right had not been diminished. The proposition which had to be affirmed was that, notwithstanding he was the contractor for the Taluq, yet by a special arrangement, he had conferred upon the defendant the right to sell in the village in question. This the defendant ought to have proved and he failed to prove. I therefore find that the plaintiff has made out his right to claim damages.

The question of law which was pressed upon us by Mr. Srinivasa Iyengar was that the plaintiff ought to have proved the loss he had sustained by reason of the defendants' wrongful act and that he had adduced no evidence on the point. The argument is based upon the principle that damages ought to be awarded by way of compensation. No doubt this is the general principle of law. But in cases of tort where there are aggravating circumstances, damages may be awarded so as to operate as a punishment (*see* Mayne on Damages, p. 43). The record shows that the defendants' claim to open a shop at Nadahalli had been disallowed by the Deputy Commissioner and yet the village was named in the license. There seems some reason to suspect fraud in this matter. When the license was cancelled, the defendant did not readily obey the orders. It seems to me that the best way of punishing him is to compel him to pay every pice of the profit he has made by his wrongful conduct and to prevent him from making a gain by his wrong. For these reasons, I agree in dismissing the second appeal with costs.

Appeal dismissed with costs.

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1895 Nov. 5.

Before A. Ramachendra Iyer, and C. Meenacshaya, Judges.

DOORGA AND OTHERS (DEFENDANTS) v. GIRI GOWDA (PLAINTIFF).*

Prescription—Injunction—Damages—Specific Relief Act (I of 1877), s. 54.

A sued for declaration of right to take water from a tank, for an injunction and for damages. It was proved that he and his ancestors had joint possession of the tank for thirty or forty years during which time they used to repair it and take water for cultivation. *Held*, that this was sufficient to support a decree for damages, against the defendants who were trespassers.

Held further that s. 54 of the Specific Relief Act (I of 1877) did not warrant a perpetual injunction. The result of invasion of *A's* right would be failure of crops, and the actual damage could be easily ascertained. There was no allegation that the damages could not be paid nor any reason to apprehend the necessity for resort to a multiplicity of judicial proceedings.

Mr. *S. Narayana Rao* for the appellants.

Mr. *Cheluviengar* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

This was a suit for a declaration of the plaintiff's right to take water from a tank, for an injunction and for damages. The defendants denied the claim and pleaded that the tank belonged to them. The courts below have concurrently found that the plaintiff's case was true and have given him the relief sought by the plaint. The defendants have made a second appeal on two grounds ; *first*, that the facts found were not sufficient to establish the plaintiff's right, and *second*, that a case was not made out for granting a perpetual injunction.

The courts below found that the plaintiff's vendors

* Appeal from appellate decree No. 136 of 1894-95, against the decree of Mr. T. Narahari Rao, District Judge, in appeal No. 17 of 1894-95, dated the 11th day of December 1894, confirming the decree of Mr. P. Venkat Rao, Additional Munsiff of Bangalore, in O. S. No. 266 of 1893-94, dated the 27th day of July 1894.

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and one Dodda Charry had joint possession of the tank in question, that they used to repair it and to take water from it for cultivation, that this state of things continued for thirty or forty years, and that the defendants had not the shadow of a right to the tank. It was contended by the appellants that the tank was made for charitable purposes. No doubt, the word *dharma* has been used in evidence, but it has not been shown that the tank was dedicated to the public, and that the plaintiff's vendors or their ancestors divested themselves of their private right. Another point which was urged by the appellants was that the land which was covered by the water of the tank was Government land and that the suit was not maintainable. We observe that the objection was not taken in the lower courts, and that it has not been shown that the Government claimed any right to the tank or that the plaintiff's vendors exercised their right of ownership with the permission of Government. The right claimed by the plaintiff has been exercised by him and his vendors for thirty or forty years past, and we are of opinion that this is sufficient to support the decree for damages which has been passed against the defendants who are trespassers.

We are of opinion that the second objection is well founded. The power of a court to grant a perpetual injunction is governed by s. 54 of the Specific Relief Act ; cl. (*a*) of the section does not apply. Regarding cl. (*b*), it may be observed that if the plaintiff's right is invaded, the result may be the failure of crops and the actual damage can be easily ascertained, as it has been done in this suit. There being a standard for ascertaining actual damage, cl. (*c*) is inappli-

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cable. There being no allegation that the defendants are not able to pay damages, the case cannot be brought under cl. (*d*) and cl. (*e*) also does not apply. There was an invasion of the plaintiff's right and the defendants have been ordered to pay damages. The matter has come to an end and there is no reason to apprehend that the plaintiff may be compelled to have recourse to a multiplicity of judicial proceedings. We modify the decrees passed by the lower courts and dismiss the suit for a perpetual injunction and direct the parties to bear their respective costs of the second appeal.

Decrees of lower courts modified. No costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

1895 Dec. 4.

RUNGAPA (PLAINTIFF) *v.* PATEL MELAPA (DEFENDANT No. 3).*

Prescription—Adverse possession—Knowledge by purchaser of defective title—Limitation.

Where a man alleged a right in himself to land and openly dispossessed another of it, paid assessment and enjoyed it as owner for upwards of twelve years, his possession must be considered adverse and sufficient to resist a suit for ejectment against him, especially in the absence of any allegation that he had fraudulently concealed his possession.

Further, a purchaser who obtained the property after it had been acquired by adverse possession, became lawful owner of it irrespective of his knowledge of any infirmity of the title of the previous holder.

Also, a suit for ejectment filed eight years after the plaintiff had attained his majority and over thirteen years after the defendant had acquired title by adverse possession was barred.

Mr. *D. Venkatramaya* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

*Appeal from appellate decree No. 10 of 1895-96, against the decree of Mr. S. R. Subbaraya Iyer, Subordinate Judge of Shimoga, in appeal No. 36 of 1894-95, dated the 10th day of April 1895, reversing the decree of Mr. C. Subba Rao, Munsiff of Chitaldroog, in O. S. No. 803 of 1892, dated the 13th day of April 1893.

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The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA) was as follows:—

The lower courts have concurrently found that defendant No. 2 obtained possession of the land from defendant No. 1 about 1877–78. The point on which there was a difference of opinion between them was, whether the possession was adverse to the plaintiff. We concur in the Sub-judge's opinion that it was adverse. The defendant alleged a right in himself and openly dispossessed defendant No. 1. He paid assessment on the land and enjoyed it as owner for upwards of twelve years, when the land was sold to defendant No. 3. There is no allegation that he fraudulently concealed his possession. That being so, there is no foundation for the argument that the cause of action arose when the plaintiff came to know of the enjoyment. It being found that the plaintiff was born before Akshya, he was of age to file a suit in 1884. The suit was filed eight years after he had become a major, and over thirteen years after defendant No. 2 had acquired a valid title by adverse possession.

It was contended that defendant No. 3, who is now in possession, ought not to avail himself of this plea, inasmuch as he had knowledge of the arrangement under which the plaintiff's land was transferred to defendant No. 1. We have found that defendant No. 2 had acquired title by adverse possession. Therefore, defendant No. 3 became lawful owner of the property by purchase, irrespective of his knowledge in regard to the infirmity of defendant No. 2's title, when possession was obtained from defendant No. 1. We confirm the decree and dismiss the second appeal with costs.

Appeal dismissed with costs.

1895 Dec. 6.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

A. OOSMAN SAIB (DEFENDANT No. 2) v. A. MAHOMED KHAN (PLAINTIFF).*

Stamp Act (I of 1879), ss. 34, 39 and 41—Recovery of money paid for stamp duty and penalty—Conclusiveness of certificate under s. 39 of the Stamp Act—Construction of document—Parties.

In a suit to recover the amount of stamp duty and penalty levied on a document produced in evidence, *Held* that, although the document was clearly an agreement and not a bond, the certificate given under s. 39 of the Stamp Act being by s. 41 of the same Act conclusive as to the amount recoverable, the sum named in it must be decreed, although it was calculated on a wrong construction of the document as a bond.

Also, there was no non-joinder of parties, as the defendant was the sole executant of the document, the suit against him alone was maintainable and his partners need not be joined even though the document related to partnership business.

Mr. *B. Srinivasa Iyengar* for the appellant.

Mr. *S. Ramaswamiengar* for the respondent.

The Judgments of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.*) were as follows :—

BEST, *J.*—Both the courts below have held the appellant liable to the respondent for a sum of Rs. 220 paid by the latter as stamp and penalty on a document executed by the appellant and produced by the respondent as an exhibit in O. S. No. 20 of 1890.

The document is, when translated, as follows :— " On an examination of the shop accounts up to 9th July 1886, the capital up to date in the shop was found to be Rs. 3,340-15-0 and the profits accruing thereon for 70 months was Rs. 767-6-0, in all Rs.

* Appeal from appellate decree No. 18 of 1895-96, against the decree of Mr. B. Thirumalacharier, District Judge of Nagar, in appeal No. 101 of 1894-95, dated the 28th day of June 1895, confirming the decree of Mr. J. E. Holt, Munsiff of Chickmagalur, in O. S. No. 572 of 1893-94, dated the 24th day of September 1894.

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4,108-5-0. Out of this, Rs. 500 are set apart to meet future expenses as necessity arises and the balance Rs. 3,608-5-0 is retained for capital. We shall carry on the trade as usual and shall pay you the profits and also the capital or principal during the examination of accounts in the third year from this date, if you demand it. To this effect we bind ourselves and have signed here below."

It was filed as exhibit *G* in the respondent's suit No. 20 of 1890 in which he sought to recover a sum of money from the present appellant. When so produced as an exhibit in that suit, it was stamped with a receipt stamp of the value of one anna, but the presiding judge held it to be a bond chargeable with a duty of Rs. 20 and levied this amount plus a penalty of Rs. 200 under s. 34 of the Stamp Act (I of 1879). Hence this suit by the respondent, under s. 41 of the Act, to recover the amounts from the appellant.

It is contended on behalf of the appellant, *firstly*, that the document is not, in fact, a bond but merely an acknowledgment, and was, therefore, properly stamped with an anna stamp; or that if it is not an acknowledgment, it is at the most an agreement, liable to a stamp duty of 8 annas plus a penalty of Rs. 5, and that this is all that the respondent is entitled to recover, if any thing at all; and *secondly*, that the appellant is not exclusively liable, but his partners in the business, on account of which the document was executed, are also liable and should have been included as defendants in the suit.

It must be conceded, I think, that the document is an agreement and *not* a *bond*. It clearly does not fall

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within the definition of a bond as given in cls. *(a)* or *(c)* of s. 3 of the Stamp Act, as (1) it contains no "condition that the obligation shall be void if a specified act is performed or is not performed," nor (2) is it an obligation "to deliver grain or other agricultural produce," and it cannot be held to come within cl. *(b)* of the definition as it is not attested by any witness. At the same time it is certainly more than an acknowledgment, for it contains an agreement to pay money. The document is, in my opinion, an agreement, the proper stamp duty on which is eight annas as provided in cl. *(c)* of art. 5, sch. I of the Stamp Act.

Such being the case, is the appellant, supposing him to be liable at all, liable for more than the above eight annas plus the penalty of Rs. 5 ? The courts below have held that this is not a question open for consideration in this suit, as the concluding words of s. 41 provide that the certificate granted under s. 39 shall be "conclusive evidence of the matters therein certified." The matters required to be certified under s. 39 are "that the proper duty or (as the case may be) the proper duty and penalty (stating the amount of each) have been levied in respect thereof (*i. e.* of the instrument) and the name and residence of the person paying them"; and what is recoverable under s. 41 is "the amount of duty or penalty so paid". Reading s. 41 as a whole, it seems to me that the lower courts are right in holding that the plaintiff in a suit under that section is entitled to recover whatever has been paid by him, as shown in the certificate granted under s. 39, in case of payments made by him on an unstamped or insufficiently stamped document.

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Our attention has been called to the decision of this court in *Siddegowda* v. *Chennamma*(1). That case is, however, distinguishable, as the document then in question was found to have been originally engrossed on paper sufficiently stamped, and consequently the levy of additional stamp and penalty was *altogether* improper.

The only other contention on behalf of the appellant is, that his partners in the firm (on account of which firm the document is alleged to have been executed by him) should have been joined as defendants in the suit. As to this, I agree with the courts below in holding that, as the defendant is the sole executant of the document, the suit against him alone is maintainable.

I would, therefore, dismiss this second appeal with costs.

MEENACSHAYA, *J.*—I concur.

Appeal dismissed with costs.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

AVOR OOSMAN SAIB (DEFENDANT No. 2) *v.* ATHIGUNDI MAHOMED KHAN (PLAINTIFF).*

1895 Dec. 6.

Stamp Act (I of 1879), ss. 34, 39 and 41—Construction of document—Parties.

A document, attested and containing an obligation to pay money *held* to be a bond and not merely an agreement.

Also, the executant of the document only was rightly sued for recovery of stamp duty and penalty paid on the document, and his partners in buniness need not be joined.

*Appeal from appellate decree No. 19 of 1895-96, against the decree of Mr. B. Thirumalacharier, District Judge of Nagar, in appeal No. 102 of 1894-95, dated the 28th day of June 1895, confirming the decree of Mr. J. E. Holt, Munsiff of Chickmagalur, in O. S. No. 571 of 1893-94, dated the 24th day of September 1894.

(1) 12 M. L. R., 328.

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Mr. *B. Srinivasa Iyengar* for the appellant.

Mr. *S. Ramaswami Iyengar* for the respondent.

The Judgments of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.* were as follows:—

BEST, *C. J.*—The facts of this appeal are similar to those of S. A. No. 18 of 1895-96, just disposed of. The difference being that the document in the present case is attested; and as it also contains an obligation to pay money, it has, I think, been rightly held to be a bond, and not merely an agreement as contended on behalf of appellants.

The only other point taken is that the appellant's partners ought to have been included as defendants in the suit, but as the document was executed by the defendant alone, the suit was clearly not bad for non-joinder of others as parties defendant.

This second appeal fails, and is dismissed with costs.

MEENACSHAYA, *J.*—I concur.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1895 *March* 7.

NANJAYA, A MINOR, BY HIS MOTHER AND GUARDIAN SEETHAMA AND ANOTHER (PLAINTIFFS) *v.* A. PEDANA (DEFENDANT).*

Minority—Undivided Hindu family—Manager—Limitation—Continuous running of time—Limitation Act (XV of 1877) *ss.* 7, 8 *and* 9*; Sch. II, Arts.* 59, 67 *and* 120*—Civil Procedure Code (Act XIV of* 1882) *ss.* 440, 441.

The obligee of a bond died two years after its execution, leaving as heir a minor son, on whose behalf a suit was instituted more than three years after the date of the bond, by a guardian appointed by the District Judge under the Rules relating to Minors in Mysore.

Held by the Full Bench (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J., RAMACHENDRA IYER, J. *dissenting*) that the suit was bar-

* Appeal No. 104 of 1893, against the decree of Mr. H. Timmakrishna Rao, Munsiff of Kolar, in O. S. No. 970 of 1892, dated the 2nd day of February 1893.

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red by limitation under Sch. II, Art. 59 of the Limitation Act (XV of 1877).

In a suit on a bond, the person entitled to sue is the person in whose favour the bond is executed, and who is competent to give a full and valid acquittance or discharge for the debt. Although the obligee may be the senior member or manager of an undivided Hindu family there can be no question as to his right to institute or maintain a suit in his own name for recovery of a debt on a bond standing in his own name and as to which there is no privity of contract between the other members of the family and the obligor or executant of the bond.

Even were the father and son jointly entitled to sue on the bond, the father alone could have given a valid discharge to the debtor without the concurrence of the son and therefore the provisions of s. 8 of the Limitation Act would apply to the case.

Further, time began to run when the deceased father was alive and under s. 9 of the Limitation Act no further disability could suspend its progress. The son cannot therefore avail himself of his minority to extend the limitation: nor can the guardian claim the benefit of s. 17 of the Limitation Act as the case is not one of the absence of a legal representative.

Also, s. 440 of the Civil Procedure Code simply indicates the procedure to be followed and does not and cannot affect the Statute of Limitations.

Per RAMACHENDRA IYER, J.—Sections 440 and 441 of the Civil Procedure Code prohibit a minor from taking action himself; yet the law has made no provision for safe-guarding his interests during his minority. The Rules regarding minors are applicable only to those possessed of property, so that there are many cases in which no action would be possible for the minor until his disability had ceased. To hold that all suits are barred if not filed within three years from the time the money became payable would work manifest injustice. * * * Sections 440 and 441 of the Civil Procedure Code ought to be construed so as to further the interests of minors and not to prejudice them. It seems to me that the best way to reconcile the Limitation Act with the Civil Procedure Code is to hold that time does not run against an estate, so long as the estate is not represented by a competent adult person. In this view it seems to me that the suit was not barred, as the Limitation Act does not expressly provide for it.

Mr. *C. Murugesa Moodelliar* for the appellants.

Mr. *S. Ramaswamiengar* for the respondent.

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The Order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) was as follows:—

The defendant borrowed Rs. 100 from the minor plaintiff's father and executed a bond in January 1889 promising to repay the sum on demand. The father was alive till May 1890. After his death there was a dispute as to who should become manager of the minor's estate. An order was made by the District Judge, about three months before the date of the suit, by which the guardian, who has instituted the present suit, was appointed guardian of the estate. The suit for money was filed more than three years after the execution of the bond.

The suit for money due upon the bond was dismissed by the Munsiff on the ground that it was barred by limitation. The guardian has appealed from the decree.

Two important questions of law arise in this appeal. Who is the person entitled to institute a suit upon the bond within the meaning of s. 7 of the Limitation Act? If the plaintiff had no interest in the bond and if he had no right to sue upon it, so long as the father was alive, it could be argued that the father was the person who was entitled to sue upon it and that time having begun to run during his life, the disability of the heir could not stop it. It might be argued on the other side that, inasmuch as the son and father were members of an undivided family and as there was no allegation that the property was self-acquired property of the father, the rights of the father and son were equal, and that without straining the language of the section, the son also might be styled "a person entitled to institute a suit upon the bond." If there is

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force in the argument, s. 9 of the Act has no application. If the alleged equal right of the father and of the son to institute a suit be considered a doubtful proposition of law, the question may be looked at from another point of view. The property did not belong to the obligee exclusively. A Hindu son does not inherit from his father as it cannot be said that he has no right until and unless the father dies. This being the position of a son in the eye of the substantive law, the question arises whether s. 7 of the Limitation Act contemplates a joint family as the person legally entitled to sue; and if a joint family is not in the contemplation of the section, whether a suit by a Hindu son for money due to the joint family may not be treated as a suit not expressly provided for and whether such suit may not be brought in six years?

If ss. 7 and 9 of the Limitation Act apply to the case, the second point is what is the effect of s. 440 of the Civil Procedure Code? The minor has no power to do anything in his own name, and the courts have no power to compel any one to sue for a minor. If no one chooses to come forward to set the court in motion on behalf of the minor plaintiff, is it right to deprive him of his property for no fault of his own? The questions are of such importance as to be argued before a Full Bench.

Referred to the Full Bench.

The Full Bench (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) delivered the following Judgments:—

THUMBOO CHETTY, *C.J.*—The plaint-bond was executed in favor of Munishamia, the deceased father of

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the minor plaintiff Nanjaya, on the 13th January 1889. The amount secured by the bond was made payable on demand. Munishamia died on the 14th May 1890. This suit was brought on the 23rd November 1892 by the guardians of the minor plaintiff.

The Munsiff dismissed the suit as barred by limitation, because it was not brought within three years from the date of the bond as provided for in Sch. II, Art. 59 of the Limitation Act. The plaintiff appealed, contending that as he was a minor at the time the cause of action accrued, the provisions of s. 7 of the Limitation Act took the case out of the Statute.

The appeal first came on before a Division Bench who referred it to the Full Bench, as several important questions of law were involved in it.

The first question is, who is the person legally entitled to sue within the meaning of s. 7 of the Limitation Act? The determination of this question will depend on the circumstances of each case and the nature of the claim, as well as the grounds on which the suit is based. In a suit on a bond, as in this case, the person entitled to sue is the person in whose favor the bond was executed, and who is competent to give a full and valid acquittance or discharge in respect of the debt or liability. The contract in this case being between the obligor and obligee of the suit-bond, there can be no question as to the legal right of the latter to institute or maintain a suit in his own name. It may be that the obligee as the senior or managing member of an undivided Hindu family, is accountable to other members of the family in respect of a loan advanced out of joint family funds, but that cannot deprive the manager of his right to institute a suit in

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his own name for the recovery of a debt on a bond standing in his own name, there being no privity of contract between the other members of the family and the obligor or executant of the bond.

The person legally entitled to sue in a case like this is, as already remarked, the bond-holder, who can give a legal and valid discharge for the debt, and the deceased Munishamia was, therefore, perfectly competent to sue for the debt in his own name, without reference to the minor or other members of his family, who were undivided in interest with him.

Assuming that both the father and son were jointly entitled to the amount secured by the bond, the father was competent to give a valid discharge to the debtor without the concurrence of the son, therefore the provisions of s. 8 of the Limitation Act clearly apply to this case. That section and the two illustrations appended to it, place the question beyond all doubt. The cause of action accrued during the life-time of Munishamia. He could have brought a suit independently of the minor; limitation began, therefore, to run not only against the father but also against the son from the 13th January 1889. The suit was filed more than three years after the accrual of the cause of action. It is, therefore, barred. The six years limitation provided by Art. 120, is not, in my opinion, applicable to this case, which falls either under Arts. 59 or 67 of Sch. II. It is only in the absence of an express provision that Art. 120 would apply. This is a suit for money due on a bond for which there is an express provision; and even though the suit may be for money due to a joint Hindu family, it is a suit based on a

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bond or promise in writing, for which there is a special limitation prescribed by the Act.

The next question referred to the Full Bench is, What is the effect of s. 440 of the Civil Procedure Code? That section provides that every suit by a minor shall be instituted by a guardian duly appointed, or with the leave of the court. The mere fact that, during his minority he was unable to sue himself and that no one was appointed guardian, or that no next friend came forward to institute the suit on his behalf, cannot operate to stop limitation running, as such cases are not provided for in the Limitation Act for the obvious reason, that statutes of limitation are statutes of repose, and without them a right might travel for a very long period, and, to use the words of Lord Eldon, "it might travel through minorities for centuries." Moreover, the Code of Civil Procedure simply indicates the procedure that should be followed in instituting and conducting suits. It does not, and cannot, affect the Statute of Limitations.

I am, therefore, of opinion, that the plaintiff's suit is barred, and the Munsiff's decision in dismissing it as such, is correct. I would dismiss this appeal with costs.

RAMACHENDRA IYER, *J.*—The suit was filed in the name of the minor plaintiff for principal and interest due on a bond which had been executed to the minor's father. The defendant admitted the genuineness of the bond, and pleaded that the suit was barred by limitation.

The plaintiff's father died within three years from the date of the bond, leaving an only son behind him, *viz.*, the minor plaintiff. Application was made to the

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District Judge to appoint a guardian of the person and property of the boy, under the Rules which relate to Minors. The person who has sued as guardian *ad litem* was appointed guardian under the Rules. The appointment was made more than three years from the date of the bond, and the guardian instituted the suit shortly after he was appointed by the District Judge.

Sections 440 and 441 of the Code of Civil Procedure enact that every suit by a minor shall be instituted by an adult person who shall be called the next friend and every application to the court on behalf of the minor shall be made by the next friend only. It follows from these provisions of law that even where a minor happens to be an intelligent lad of seventeen years of age and fairly able to protect his own interests, the Code will not permit him to take any action himself. A plaint or application which he may file and which may be absolutely necessary in his interests, will be treated by a civil court simply as a piece of waste paper.

The law which prohibits a minor from taking action himself has made no adequate provision for safeguarding his interests during his minority. The Rules which relate to the custody and guardianship of minors cannot be applicable to all minors in the State; for if minors are not possessed of property of large value, courts will not be moved to appoint guardians, neither will they regard action under the Rules necessary or desirable. If action is deemed necessary it involves time, as it has done in this case, and the law affords no protection to an estate during the in-

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terval. If action is not deemed necessary, the minor is left to shift for himself as best he can. Let us say that there is a minor who knows how his affairs stand, and who is possessed only of two or three bonds for trifling sums of money. What course is open to him to recover the money during the minority? He cannot file a suit himself; he cannot compel a neighbour or a relative to sue on his behalf; neither can he move a judge to appoint a guardian for filing a suit.

Let us look at the case from another point of view. It may be that the minor has no occasion to sue and that the debtor is willing to pay without demand. There is no person who can receive the money. Payment to the minor is of course out of question; and there is no one to whom the debtor can pay, because there is no one who has power to grant a receipt. The money cannot be paid into a court; for a judge has no power to receive money which is not paid in satisfaction of a decree or order or on account of an estate which is under the court's management.

In all the cases which I have mentioned by way of illustration, if we hold that suits are barred if they were not filed within three years from the time when the money became payable, it will work manifest injustice. The rule will deprive a boy of money for no fault of his, nay when he might have sued, but for the prohibition of the law, or even when a suit would have been needless if there was a person competent to grant a receipt. There is no need to dwell upon the injustice to which innocent babes may be exposed. The Civil Procedure Code shows its solicitude to protect the interests of minors by compelling guardians to take the permission of a court before they compromise

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suits. Sections 440 and 441 of the Civil Procedure Code ought to be so construed as to further the interests of minors and not to prejudice them. It seems to me that the best way to reconcile the Limitation Act with the Civil Procedure Code, is to hold that time does not run against an estate, so long as the estate is not represented by a competent adult person. In this view it seems to me that the suit was not barred, as the Limitation Act does not expressly provide for it.

KRISHNA MURTI, *J.*—I have given this hard case my best consideration, and am unable to differ from the view of the lower court that the suit is barred. There may be a little hardship to the infant plaintiff, but I am not prepared to say that there is no element of laches, the effect of which will no doubt bind him. The provisions of chap. XXXI of the Code of Civil Procedure cannot, in my opinion, be regarded as creating any equitable ground of indulgence in favor of the infant. This is not a case in which the infant from any cause outside the legal disabilities laid down by law was disabled from prosecuting his right till that disability ceased and has come before us as an innocent, helpless, injured person. The present suit was filed by a guardian on behalf of the minor and it may be assumed, as the protracted proceedings before the District Judge indicate, that the defence of the interests of the minor was vigorously and persistently fought out by more than one person. The infant was not labouring under any inability to find a person to represent him in court, but in the strife for the coveted position the real interest of the minor was overlooked. This is no doubt an unhappy feature in the case, but it is quite inadequate to induce a court of justice to

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override the express restrictions laid down by ss. 8 and 9 of the Limitation Act. It is unnecessary to consider the provisions of the Civil Procedure Code any further, as the suit has not been brought by a minor but by his duly constituted guardian, who doubtless is guilty of great laches.

Time began to run when the deceased father of the plaintiff was alive and under s. 9 of the Limitation Act, no further disability could suspend its progress. This has been the view taken by most eminent judges during the long period of the existence of the law of limitation, and I hesitate to "invent something which I do not meet within the words of the text. The judge's duty is to say what the law is, not to make or give a new law (*jus dicere non dare*). To go beyond the words, where they are unequivocal and precise, is to *legislate*, not to interpret. A *casus omissus* or a mistake made by the framers of the statute cannot be remedied by a court of law; the statute must be construed literally as it stands."(1) See *Thakur Kapilnath* v. *the Government*(2) and *H. Ramachendra* v. *Krishnaji*(3). In the former of these cases the extension of the principles of the Limitation Act in favour of an infant was refused, when to prevent an apparent hardship under a special Act it was urged upon the attention of the court. In *Vira Pille* v. *Moruga Muttayan*(4), Scotland, *C. J.* and Innes, *J.* observed with reference to the District Munsiff's remark as to the injurious application of the enactment, "that proper legal proceedings to enforce the bond might have been taken during the plaintiff's minority."

(1) Law of Limitation by N. N. Mitra, p. 146.
(2) 13 B. H. C. Rep., 44. (3) 10 B. H. C. Rep., 204.
(4) 2 M. H. C. Rep., 340.

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The classification of suits adopted in the Limitation Act has no reference to the status of the parties, and it does not appear to me correct to resort to the provisions of Art. 120, in preference to those of Art. 59, on the ground that the plaintiff is a minor duly represented by his guardian.

This is not a case of the absence of a legal representative. As soon as the father died his property devolved upon and was vested in the son. Moreover, the period of limitation having commenced to run during the life-time of the father, the guardian cannot claim the benefit of s. 17 of the Act.

For these reasons, I hold that the decree appealed against must be confirmed, and this appeal be dismissed with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1895 *Jan. 28.*

VENKAPA AND ANOTHER (DEFENDANTS NOS. 2 AND 3) v. NUMBANA (PLAINTIFF).*

Limitation Act (XV of 1877) Sch. II, Art. 138—Court-sale—Symbolical possession—Judgment-debtor holding over—Trespass—Cause of action.

A purchaser of land at court-sale obtained symbolical possession from the court some nine months after the auction. The judgment-debtors remained in possession after the delivery of possession and the purchaser sued them twelve years after the date of sale but within twelve years of his having obtained possession. *Held,* that the suit was not barred by limitation under Sch. II, Art. 138 of the Limitation Act, as the judgment-debtors by remaining in occupancy after formal delivery of possession became trespassers and there was a fresh cause of action to the decree-holder as purchaser. *Also,* formal possession through the court gave the purchaser not

* Appeal No. 350 of 1893-94, against the decree of Mr. B. Srinivasarow, Munsiff of Nelamangala, in O. S. No. 94 of 1893, dated the 19th day of March 1894.

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only a fresh starting point as regards limitation, but also a fresh cause of action; and symbolical possession of property obtained through the court was effective as against the judgment-debtor.

Mr. *K. T. Narasimiengar* for the appellants.

Mr. *S. Narayana Row* for the respondent.

The Judgments of the Chief Court (THUMBOO CHETTY, *C. J.* and KRISHNA MURTI, *J.*) were as follows:—

THUMBOO CHETTY, *C. J.*—On the merits, I am disposed to agree with the Munsiff for the reasons given in his judgment and to hold that the nineteen guntas of land in dispute formed portion of the land which was puchased by the plaintiff's deceased father at auction on the 28th February 1881. The only question I took time to consider was, whether the present suit was or was not barred by limitation. The suit was instituted on the 1st March 1893, and it was contended by the advocate for the appellants, that, twelve years computed from the date of sale having expired on the 28th February 1893, the suit was beyond time by one day and was, therefore, barred by Sch. II, Art. 138 of the Limitation Act. The appellants, who are the really contending defendants, were parties to the court-sale and the execution proceedings. They were the judgment-debtors who were in possession of the land at the time. The auction-purchaser obtained symbolical possession on the 5th December 1881. The appellants, by having remained in occupancy after formal delivery of possession, became trespassers, and there was a fresh cause of action to the decree-holder as purchaser. As held by the Calcutta High Court in *Shama Charan Chatterji* v. *Mahdub Chandra Mookerji*(1) the formal possession taken through the court gave the decree-holder (as purchaser) not only a fresh starting point

(1) I. L. R. 11 Cal., 101. Referred to in I. L. R. 10 Mad., 54, 55.

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as regards limitation, but also a fresh cause of action. It was likewise held in *Jaggobhundhu Mitter* v. *Purmanand Gossami*(1) that symbolical possession of property obtained through the court was effective as against the judgment-debtor, defendant. Following these decisions, I hold that the present suit is not barred by limitation. I would dismiss this appeal with costs.

KRISHNA MURTI, *J.*—I concur.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1895 *Jan. 28.*

S. NARASIMIA (DEFENDANT No. 2) *v.* PUTTA NANJAMA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1).*

Usufructuary mortgage—Agreement for absolute sale—Waiver—Improvements—Interest on kandayem paid by mortgagor.

In a deed of usufructuary mortgage there was a condition that on failure of due payment of the mortgage amount, the mortgagee might enjoy the land as if it was sold: to this condition was appended the terms that the mortgagor should tender a resignation of the land in favour of the mortgagee and cause mutation of names to be made in the Revenue Register. There was failure by the mortgagor to pay the mortgage money on due date, but there had been no attempt to get any mutation of name nor any request or demand on the part of the mortgagee. *Held*, that under such circumstances, there had been a waiver of the breach of condition and no intention of enforcing the agreement for making the conditional sale absolute: the mortgagor's right to redeem remained intact and a sale by him to a third party after the breach and subject to the mortgage was valid. *Held also*, that a usufructuary mortgagee in the absence of any stipulation in the mortgage deed is not entitled to claim the value of improvements because he has enjoyed the whole proceeds without accounting for the same.

Also, the mortgagor being bound to pay *kandayem* and having

* Appeal No. 356 of 1893-94, against the decree of Mr. A. Ananda Row, Munsiff of Tumkur, in O. S. No. 240 of 1893-94, dated the 20th day of March 1894.

(1) I. L. R. 16 Cal., 532.

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failed to do so, should in fairness, pay interest by way of damages on *kandayem* paid by the mortgagee.

Mr. *Sabapathi Iya* for the appellant.

Mr. *D. Venkataramia* for respondent No. 1.

The Judgments of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) were as follows:—

THUMBOO CHETTY, *C.J.*—I am of opinion that the Munsiff's decision is correct and ought to be affirmed. It is true that there is a condition in the mortgage deed that, if the mortgage amount be not paid within five years, the mortgagee may enjoy the land mortgaged, as if it was sold. But it is clear from defendant No. 2's own written statement that the breach of condition was waived, and that the agreement for absolute sale was not carried out. Defendant No. 2, according to his own evidence and that of the witnesses, negotiated with defendant No. 1 for the purchase of the land, and offered to pay a certain amount as consideration for the proposed sale. The Munsiff has rightly, I think, discredited the evidence offered by defendant No. 2 to prove the said negotiation and the alleged payment of the ten rupees. But the attempt made by defendant No. 2 to purchase the land from defendant No. 1 only shows that the condition for sale contained in the mortgage deed was not carried out, and that the right of the mortgagor to redeem was not extinguished or legally determined. Then again it must be observed that, according to the terms of the mortgage deed, a mere default in the repayment of the mortgage amount within the stipulated time was alone not sufficient to make the conditional sale absolute. It was incumbent on the mortgagor to tender a resignation of the land in favor of the mortgagee, and to

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cause a mutation of names in the Revenue Register by transfer of putta in the name of the mortgagee. There was no attempt to get this done, nor was there any request or demand on the part of the mortgagee, which confirms defendant No. 1's contention that the agreement as to conditional sale was never intended to be enforced. Under these circumstances, I agree with the Munsiff in holding that defendant No. 1's right to redeem remained intact, and that the sale of the land by him to the plaintiff, made subject to the mortgage lien created in favor of defendant No. 2, was perfectly valid. In the view I have taken of this case, it is unnecessary to consider the general question, whether, in Mysore, a contract by conditional sale may be held to have become absolute on failure to repay the amount secured thereby within the specified time.

Defendant No. 2 has, as found by the Munsiff, failed to prove satisfactorily the value of the improvements effected by him to the land. Even if he had effected some improvements, as a usufructuary mortgagee and in the absence of any stipulation in the mortgage deed, he is not entitled to claim the value of the improvements, because he has enjoyed the whole produce without accounting for the same. He is entitled only to be repaid the amount of *kandayem* which the Munsiff has awarded with interest.

Plaintiff's cross-objection relates to the interest allowed on the *kandayem* amount. Under the terms of the mortgage deed, the mortgagor was liable to pay the *kandayem*, but as he failed to pay and defendant No. 2 had to pay, it is nothing but fair that, on the payments so made, interest should be allowed by way of damages.

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The appeal by defendant No. 2 and the cross-objection by the plaintiff must both be dismissed with costs.

RAMACHENDRA IYER, *J.*—I also think that the Munsiff's decree was right. I am inclined to think that the mortgage was not converted into a sale when the mortgagor failed to pay the mortgage amount at the end of five years. The document does not contain an indication of an intention to prevent the mortgagee from claiming the money. I can see no provision in the document to compel the mortgagee to accept the land in satisfaction of the debt. If the mortgagee could claim back the money, I think that the document did not by itself operate as a sale-deed in default of payment of the debt.

There is a stipulation in the document that if the mortgagor failed to pay the assessment on the land, he was bound to get the putta transferred in the mortgagee's name. A formal transfer of putta was not needed to enable the mortgagee to pay the assessment on account of the mortgagor, and I presume that the intention of the parties in making the stipulation was to enable the mortgagee to pay the assessment and also to ensure the punctual payment of assessment by the mortgagor. A similar provision is made for the transfer of the putta being made if the debt was not repaid at the end of five years, and this seems an additional reason for holding that it was not the intention of the parties that the relation of mortgagor and mortgagee should cease at the end of five years and that, thereafter, the mortgagee should become a vendee.

This view of the transaction is confirmed by the conduct of the parties. When default was made at the end of five years, the mortgagee negotiated with the mortgagor for the sale of the land.

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The Munsiff's findings upon the remaining issues seem to be right, and I agree in dismissing the defendant's appeal and the plaintiff's memorandum of objections.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1894 August 31.

PRABHAVIA (DEFENDANT No. 4) v. RAMAKRISHNAPA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3).*

Suit for immoveable property—Onus on plaintiff—Production of document in possession or power of opposite party—Notice—Evidence Act (I of 1872) ss. 65(a) and 66—Civil Procedure Code (Act XIV of 1882), s. 544—Reversal of decree on appeal of one party against others who did not appeal.

A sued to recover immoveable property alleged to have been sold to him by *B*. *B's* title was denied by *C*, *D* and *E*, and the last two claimed to be in possession under a sale to them by *C*, which had been effected of two separate portions of the property, one to each. The court of first instance held that *A* had proved his case and gave him a decree for possession. *D* alone appealed and claimed under s. 544 of the Code of Civil Procedure, to have the decree set aside wholly so as to affect *A's* right to recover possession of even the share separately sold to *E*.

Held (by the Division Bench), that, as the evidence went no further than to prove joint possession by the plaintiff and contesting defendants, a decree could not be given to the plaintiff, who must recover on the strength of his own title and not upon the weakness of that of the defendants: therefore the decree against the appealing defendant must be reversed.

Also, although a document required by one party be in the possession or power of the opposite party, notice must be given to produce the document; otherwise secondary evidence of its contents cannot be given under ss. 65(*a*) and 66 of the Evidence Act.

Held further by the Full Bench (THUMBOO CHETTY, *C. J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*), that under s. 544 of the Civil Procedure Code the court had power to reverse the whole decree and should do so because it proceeded upon a ground com-

* Appeal No. 181 of 1893-94, against the decree of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, in O. S. No. 772 of 1892, dated the 2nd day of August 1893.

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mon to all the defendants and moreover was a decree that could be executed only jointly against them and not a separate decree against each so far as his separate share only was concerned.

Mr. *Ramaswamier* for the appellant.

Mr. *D. Venkataramia* for respondent. No. 1.

The Order of the Chief Court, Division Bench, (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, J.) was as follows:—

The Plaintiff sued to recover possession of a house sold to him by Lutchamaya, defendant No. 1, on the 18th November 1891.

Defendant No. 1 admitted the sale and stated that he made over the house to the plaintiff and was, therefore, not liable in this action.

Defendants Nos. 3 and 4, who were the really contending defendants in the case, pleaded that defendant No. 1 had no right to the house, which belonged to defendant No. 2, who had sold a portion thereof to defendant No. 3 and another portion to defendant No. 4 on the 2nd September 1892.

Defendant No. 2 supported the pleas put forward by defendants Nos. 3 and 4, and stated that the house originally belonged to one Yelai Nanjundapa, in whose keeping she was, and that she got the house from him thirty years ago; that she was in possession and enjoyment of the house up to the 2nd September 1892, when she sold the northern one-third share of the house to defendant No. 3 and the southern two-thirds share to defendant No. 4.

The cause of action as set forth in the plaint, was, that defendant No. 1 obtained the house from the plaintiff about two months prior to the date of institution of the suit (16th September 1892) to live in and

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that subsequently defendants Nos. 1 and 2 colluded with defendants Nos. 3 and 4 to deprive the plaintiff of the house. The cause of action, it is said, accrued on the 4th September 1892, when defendants Nos. 3 and 4 laid down foundations on the vacant site attached to the suit-house and shut up the outer door on the southern portion of the house, and opened a new one towards the northern portion.

The Munsiff of Chickballapur decreed possession of the house to the plaintiff, with costs as against defendants Nos. 2, 3 and 4. Defendant No. 1 was directed to bear his own costs. The Munsiff held that the house belonged to defendant No. 1 and not to defendant No. 2 and that therefore, defendants Nos. 3 and 4 obtained no right under the sale by defendant No. 2.

Defendant No. 4 has preferred this appeal for the reversal of the whole decree, joining the plaintiff and defendants Nos. 1, 2 and 3 as respondents and paying full stamp duty on the value of the whole house including the share sold to defendant No. 3.

The questions for decision in this appeal are :—

Firstly.—Whether the house in suit belonged to the plaintiff's vendor, defendant No. 1, or to defendant No. 2, the vendor of defendants Nos. 3 and 4.

Secondly.—Defendant No. 3, not having appealed against the Munsiff's decree, whether in the event of defendant No. 4 succeeding in this appeal, he is entitled, under the provisions of s. 544 of the Code of Civil Procedure, to have the Munsiff's decree set aside wholly, so as to affect the plaintiff's right to recover possession of even the one-third share separately sold to defendant No. 3.

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Defendant No. 2 is reported to have died subsequent to the institution of this appeal and there was no application to bring in any of her legal heirs or representatives on the record. The advocate for the appellant represented that deceased defendant No. 2 had no heirs and that the appellant elected to proceed against the remaining respondents. Defendant No. 2's name was, therefore, struck out of the record.

There is absolutely no evidence to prove how or when the suit-house was originally acquired by either defendants Nos. 1 and 2. It is admitted by the witnesses examined by both the plaintiff and defendant No. 4, that defendants Nos. 1 and 2 lived together in the suit *watara*, that originally there was only a thatched shed which took fire and that, subsequently, *i. e.*, sixteen or seventeen years ago, the present terraced house was built. Some of the plaintiff's witnesses say that defendant No. 1 built the *maligai* or terraced house, while the defendants' witnesses say that Nanjundapa, in whose keeping defendant No. 2 was, built the house. The evidence as to the construction of the *maligai* by defendant No. 1 or Nanjundapa is meagre and unreliable. Defendant No. 1 is the brother of defendant No. 2. The daughter of the latter was married to the former, and it is admitted by some of the plaintiff's witnesses that defendants Nos. 1 and 2 resided together not only in the old thatched house, but also in the new *maligai*. The fourth witness for the plaintiff deposed that defendants Nos. 1 and 2 had been living in the new house ever since it was built. Defendant No. 2 swore that she was living in the suit *watara* for more than twenty years, *i. e.*, ever since she became the concubine of Nanjundapa. De-

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fendant No. 1 has not put himself into the box to deny this statement, or to affirm that he himself built the house. The mere fact, that he was the *puttadar* or that he paid the *kandayem* does not establish his right to the house. The shanbogue, who was examined as the plaintiff's seventh witness, does not say that he ever received *kandayem* from defendant No. 1. From the mere fact, that defendant No. 1's name is entered in the *khate* accounts and the payment of *kandayem* is credited in his name, the shanbogue persumed that *kandayem* must have been paid by defendant No. 1, but he admitted that he has been performing the duties of shanbogue only for the past five or six years and that during this period, defendant No. 1 never paid *kandayem* into his hands. Defendant No. 2 swore that she has all along paid the *kandayem* and defendant No. 1 has not contradicted this statement on oath. It is probable that, as defendant No. 1 was her own brother and son-in-law and was the only male member in her house, defendant No. 2 paid the *kandayem* through him. This accounts also for defendant No. 1's name appearing in the *khate* accounts. Defendant No. 1, however, has not produced any *puttas* or receipts in his own name and there is absolutely no evidence to prove his title to the house. At the same time it must be admitted, that defendant No. 2's title too has not been established. She alleged for the first time, in her examination, that there was a document executed by her paramour Nanjundapa conveying the suit-house to her, but that document was taken away by defendant No. 1 and handed over to the plaintiff. The existence of this document was not at all referred to by defendant No. 2 in her

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written statement. The plaintiff was not put a single question about it in his examination, and neither defendant No. 1 nor the plaintiff was asked to produce it. In reply to a question by the court as to why no notice or summons was taken out by defendant No. 1 or the plaintiff for the production of this important document, the appellant's advocate was unable to submit any satisfactory explanation. He tried to show that, as the document was with the adverse party, he (appellant) could not be expected to produce it or take out notice for its production. It may here be pointed out that, under the provisions of s. 65 cl. (*a*), of the Evidence Act, secondary evidence may be given of the existence or contents of a document, only when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when, after the notice mentioned in s. 66, such person does not produce it. Section 66 clearly lays down that "secondary evidence of the contents of the document referred to in s. 65, cl. (*a*) shall not be given, unless the party proposing to give such secondary evidence has previously given to the party, in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case." The Munsiff acted irregularly in admitting oral evidence as to the alleged execution of the conveyance by Nanjundapa to defendant No. 2, when there was no compliance with the requirements of the law as contained in s. 66 of the Evidence Act, and so much of the evidence of defen-

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dant No. 4's second, third and fourth witnesses as relates to the alleged conveyance must be rejected as inadmissible.

As already remarked, neither defendant No. 1 nor defendant No. 2 has proved his or her title to the suit-house; there is indeed ample evidence to warrant this court finding that defendant No. 2 was in possession of the house, if not exclusively, at least jointly with defendant No. 1; but, in a case like this, where the plaintiff seeks to oust the defendants who are in possession, he can only succeed on proving his title affirmatively and not upon the weakness of the defendants' title. Defendant No. 2 under whom defendants Nos. 3 and 4 claim, has been in possession for more than twelve years, and it has not been proved that defendant No. 1, under whom the plaintiff claims, was the owner of the house or that he simply allowed defendant No. 2 to reside in the house. Under these circumstances the plaintiff cannot be permitted, on the strength of the sale-deed executed by defendant No. 1, to eject the defendants who claim to be in the house under defendant No. 2. In this view, we must allow defendant No. 4's appeal and reverse the decree of the Munsiff so far as he is concerned.

The next question for decision is, whether, under the provisions of s. 544 of the Civil Procedure Code, the Munsiff's decree must be reversed even with regard to defendant No. 3 who has not appealed. Section 544 of the Code of Civil Procedure runs as follows :—

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plain-

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tiffs or of the defendants may appeal against the whole decree, and thereupon the appellate court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be."

In this case, there were four defendants. Defendant No. 1 admitted the plaintiff's claim. Defendants Nos. 2 to 4 resisted the plaintiff's claim. The Munsiff gave judgment for the plaintiff for possession, on the ground that defendant No. 1 was the rightful owner competent to sell the property to the plaintiff, and that defendant No. 2 had no right and consequently defendants Nos. 3 and 4 derived no right from defendant No. 2. Defendant No. 3, who did not appeal against the Munsiff's judgment, was in possession of a particular portion of the house, the exact position and measurements of which are given in his sale-deed. The portion purchased by defendant No. 4 under a separate sale-deed is quite distinct and separate from the portion sold to defendant No. 3. Each of the defendants occupy separately their respective portions. The decree passed by the Munsiff virtually amounts to a decree against defendant No. 3, directing him to give over to the plaintiff possession of the portion in his possession and occupation, and against defendant No. 4 for delivery to the plaintiff of that portion in defendant No. 4's separate possession and occupation. Both the defendants are not jointly interested in the *whole* property. Each possesses an interest in his own share which is separately defined by actual measurements. Under these circumstances and having regard also to the separate pleas put forward by defendants Nos. 1 and 2, under whom the plaintiff and defendants 3 and 4 respectively claim, there is a

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doubt as to the applicability or otherwise of s. 544 of the Civil Procedure Code to this case. The question is not free from doubt, having regard to the decisions. See *Syed Hussain* v. *Madan Khan*(1) and the previous decisions quoted therein.

We, therefore, refer the question for the decision of the Full Bench; and, pending the decision of that Bench, we reserve our order as to defendant No. 3's share of the suit-house and also as to the costs of this appeal.

1895 *March* 22.

The Judgments of the Chief Court (THUMBOO CHETTY, *C. J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) were as follows:—

RAMACHENDRA IYER, *J.*—The plaintiff sued for possession of a house which had been conveyed to him by defendant No. 1. Defendants Nos. 3 and 4 who had purchased different portions of the house on different dates from defendant No. 2, alleged their vendor's title and denied that of the plaintiff's vendor. The Munsiff of Chickballapur found that the plaintiff had acquired a good title and ordered the defendants to deliver possession.

Defendant No. 4 alone appealed from the decree. His appeal was made in respect of the whole house and not his share only. This court was of opinion that the evidence was not sufficient to establish the plaintiff's title and that the Munsiff's decree was wrong. The point which was reserved for further consideration was, whether the suit was to be dismissed against both the defendants or against the appellant alone.

It may be remarked that the Munsiff did not make a decree against each defendant so far as his separate

(1) I. L. R. 17 Mad., 265.

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share was concerned. It was made jointly against both for delivery of possession of the house in suit. Defendant No. 4 paid institution fee upon the value of the whole house.

I am of opinion that s. 544 of the Code of Civil Procedure gives us power to reverse the whole decree, inasmuch as the decree appealed against proceeds on a ground common to all the defendants. There was no conflict between the titles of the defendants. The ground of action against each defendant was the same and so far as they were concerned in defeating the plaintiff's claim, the grounds of defence were identical. The finding of the court being that the plaintiff had no title to sue, it is an anomaly to permit him to recover a portion of the property and I conceive that s. 544 is intended to enable the court to avoid such anomaly.

It may be instructive to review the judgments of the High Courts which show the cases which have been considered to be within the section. There is a judgment delivered by Couch, *C.J.* in *Shaikh Nagar* v. *Shurintoollah and others*(1) which is as follows :—"As to the share of Raichand, it is the fact that two suits were brought by different parties claiming different interests in that share to set aside the sale of it, and both the suits were dismissed by the first court ; but there was an appeal in one of them only and in that the sale was set aside. It appears to us that this decision must be considered as setting the sale aside as to the whole of that share although the other parties did not appeal. If they both had joined in one suit but only one had appealed, the decree of the appellate

(1) 20 W. R., Civ. Rul. 77.

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court would have been for the benefit of both, and the whole sale would have been set aside. Their bringing separate suits instead of joining in one suit ought not to make any difference in that respect." The judgment proceeds much further than the case before us seems to call for. It is however a clear authority for the proposition that, when two persons whose interests are distinct and separate, join in a litigation because they have a common interest, if one of them makes an appeal, it is for the benefit of both and decree may also be given in favor of the party who has not appealed.

In *Srimati Jadumani Dasi* v. *Srimati Fudu Bibi and others*(1) a mortgagee sued the two mortgagors for money and the person in possession of the mortgaged property was made third defendant. They all impugned the genuineness of the bond. The Munsiff found that the document was genuine and directed the sale of the property. Defendant No. 3 alone appealed. The lower appellate court held that the bond was not true, reversed the decree and dismissed the suit against all the defendants. The High Court was of opinion that this was right, because "the basis of the suit and the ground upon which the defence of the parties in the suit, the defendants Nos. 1, 2 and 3 rested, was whether this bond was genuine or not."

The case of *Seshadri* v. *Krishnan and others*(2) shows the application of the section by the Madras High Court to defendants whose interests were opposed. That also was a suit by a mortgagee against the mortgagor and the subsequent purchaser of the property. The man who was made third defen-

(1) 7 B. L. R., App. 28. (2) I. L. R. 8 Mad., 192.

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dant was one who was separately indebted to the plaintiff and who had agreed to discharge that debt as also the debt which was due by defendant No. 1 or to give a fresh mortgage for the consolidated debt. Defendant No. 1 pleaded that he was not a necessary party to the suit. Defendant No. 2 pleaded discharge of the first debt, and the third denied the agreement alleged to have been made by him. The court of first instance made a decree against defendant No. 1 personally and also against the mortgaged property and made all the defendants liable to the plaintiff's costs. Defendants Nos. 2 and 3 only appealed. The appellate court found that the debt had been discharged and dismissed the suit against those defendants. The High Court was of opinion that the finding that the debt had been discharged was a ground for dismissing the suit against defendant No. 1 also, although he had not appealed, and there was a personal decree against him in which the other defendants had no concern. See also *Yerrabalu Viraragava Reddi* v. *Abdul Khadir Sahib and another*(1).

Doorga Chunder Doss v. *Mahomed Abbas Bhooyan*(2) was a suit between an alleged proprietor and the cultivating ryots who denied his title. The plaintiff's suit was decreed by the first court and on appeal by one of the defendants, the decree was wholly reversed. When this was objected to in second appeal, the High Court upheld the District Judge's decree on the following ground :—" Now the defence of Abbas and his co-defendants, who were all treated as ryots, was, amongst other things, that the plaintiff had no title, and the Deputy Collector decided that point

(1) 4 M. H. C. Rep., 26. (2) 14 W. R., 121.

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adversely to all the defendants, so that when Abbas appealed on the same question, he was appealing against a judgment which was adverse to all the defendants on a ground common to all of them." See also *Shaikh Mahomed Saefoollah* v. *Shaikh Anwar Ali and others*(1).

Nagamma v. *Subba and others*(2) was a suit for partition and rent against the plaintiff's co-owners and cultivating tenants. The plaintiff and the co-owners consented to a decree for the plaintiff for a particular share of the joint property. The Munsiff gave a decree against the tenants for mesne profits. The tenants appealed and the suit was wholly dismissed on the ground of want of jurisdiction.

The meaning of the section may be better understood if we consider the cases which have been considered to be beyond its scope and the grounds of their decision..

The earliest case on the point seems to be that of *Sreemutty Khermukuree Dossee* v. *Nilambur Mundal and others*(3). The plaintiff sued for possession. The defendants were the vendor and those who claimed to be his co-parceners. The vendor (defendant No. 1) denied the genuineness of the conveyance and the other defendants denied his right to convey. The court of first instance found the document genuine and the property to be the self-acquired property of the vendor and decreed the suit for possession. The co-parceners alone appealed from the decree. The District Judge reversed it and dismissed

(1) 21 W. R., 112. (2) I. L. R. 11 Mad., 197.
(3) 2 W. R., 227.

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the suit. The point urged in special appeal was, whether the District Judge was right in dismissing the suit against the vendor. One judge upheld the decree and two others reversed it. The reasons given by Phear, J. for reversing the decree were :—" Section 337 (which is the same as s. 544 in the present Code) applies only to those cases where the court below has made a decree against several persons whether plaintiffs or defendants upon a finding of law or fact which applies to all the persons alike. In such a case, the section enables the court of appeal, on the application of any one or more of the persons decreed against, to affirm, modify, or reverse the whole decree, as well with regard to its force against those who did not appeal as against those who did." After thus stating the law, the learned judge went on to say that the case of the executant was different from that of the co-parceners, that to obtain a decree against the executant it was enough if the conveyance was found to be true and that this finding alone would not be sufficient to enable the Court to decree the claim against the co-parceners. Justice Trevor, who agreed with Phear, *J.* said that the co-parceners could only appeal on the ground that the vendor had no right to convey their interests and that their case was different from that of the vendor.

In *Boydonath Surmah and others* v. *Ojan Bibee and others*(1), the judgment was based upon the ground that the interests of the defendants were different and that it was possible to give a decree for the plaintiff against some defendants and to dismiss the suit against the rest. In fact the

(1) 11 W. R., 238.

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first court decreed against all the defendants but one. When one of the defendants appealed from the decree to the District Judge, the High Court was of opinion that the District Judge had no power to re-open the whole case, because the decision of the first court did not proceed on any ground common to all the defendants, but when it "supported the title of Ojan (one of the defendants) and disallowed that of each of the four other defendants, it disallowed them on different grounds and with reference to different shares."

The judgment in *Sriram Ghatak* v. *Brajamohan Ghosal and others*(1) was passed in a suit brought by a creditor against two men who had borrowed money on a bond. Decree was made against both and one alone appealed against it. The District Judge dismissed the suit. This was found to be wrong, as the High Court was of opinion that the suit was such that it was possible to decree against one defendant and dismiss the suit against the other. The judgment seems opposed to the other judgments which I have above referred to. However it is obvious that the ground of decision does not apply to the case under consideration.

The cases of *Chunder Monee Dossee* v. *Modhoo Dey and others*(2) and *Nakur Chunder Saha* v. *Gudu Nath Chuckerbutty*(3) were decided on the same ground that the defendants had different rights and that it was competent to the court to decree a portion of the claim against some defendants only.

(1) 3 B. L. R., App. 41. (2) 23 W. R., 166.
(3) 24 W. R., 389.

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The latest case on the point is that of *Syed Hussain* v. *Madan Khan*(1). The principle is thus enunciated. Section 544 presupposes "a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest." The proposition thus stated does not necessarily limit its application to cases in which the property in suit is jointly claimed by all the defendants, as the property may be different and the ground of decision may be common to all the defendants. The judges have expressed their concurrence with the decisions in *Seshadri* v. *Krishnan and others*(2) and *Nagamma* v. *Subba and others*(3) thereby showing that the section may apply although the interests of the defendants are different and that what is needed is only a common ground of attack or defence. The judges having followed the judgment in *Sriram Ghatak* v. *Brajamohan Ghosal and others*(4), I presume that the circumstances of the case made it possible for the plaintiff to obtain a decree against the sixth defendant alone for one plot without obtaining a decree against the other defendants for the other plot.

The rule which I deduce from these decisions is, that if one of several plaintiffs or defendants appeals from a decree, it may be reversed in favor of the remaining plaintiffs or defendants if the ground of "decision" is common to all. This is precisely the case before us and I think the section applies to it.

KRISHNA MURTI, *J.*—The action laid by the plaintiff was one of trespass, if that technicality is permissible to suits filed under the Code of Civil Procedure.

(1) I. L. R. 17 Mad., 265. (2) I. L. R. 8 Mad., 192.
(3) I. L. R. 11 Mad., 197. (4) 3 B. L. R. App., 41.

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The plaintiff averred that the house forming the subject matter of this suit was his, that it was in his possession, that the defendants wrongfully entered upon it, and that they committed other wrongful acts. On these averments the plaintiff claimed the following reliefs :—

1. That his right to the house should be declared.

2. That he should be put in possession of the house.

3. That for the wrongful acts of the defendants he should be given damages.

Defendants Nos. 3 and 4 denied the right of the plaintiff and set up other independent sales of parts of the property to themselves by defendant No. 2. Defendant No. 1, who was the plaintiff's vendor, admitted the plaintiff's claim.

The Munsiff found that defendant No. 1 had the right to sell the house and that defendant No. 2 had no right and decreed the plaintiff's claim for possession.

Defendant No. 4 alone appealed against the decree. He paid the court-fee for the value of the whole house and made the plaintiff and the other three defendants respondents. Defendant No. 2 died in the course of the appeal and his name was struck off. Defendant No. 3 appeared in person and he is said to have stated that he had no other case than that urged by defendant No. 4 and the appellant. The result of the appeal, heard by a division bench of this court, was that on the merits the finding of the lower court was reversed and it was held that defendant No. 1 had no right to sell the house to the plaintiff and that the

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latter derived no title from such sale. Defendant No. 3, who had not separately appealed, but was only before the court as a respondent, claimed the benefit of this finding and prayed that the decree as against him also might be reversed under s. 544 of the Code of Civil Procedure. The question which was argued before the Full Bench was, whether the appellate decree ought to reverse the whole of the decree of the lower court or only so much of it as affected defendant No. 4's portion of the house as he alone had appealed.

The law contained in s. 544 of the present Code has remained the same from the time of Act VIII of 1859 and there has been necessarily a large number of decisions under it. These cases ought not to be regarded as so many interpretations of a plain rule, but as embodying the different principles which guided the courts in the exercise of their discretionary power under this law. When the language of a statute is very clear, it is the duty of a court of justice to give effect to it. It is unnecessary to introduce restrictive words not to be found in the statute itself and unreasonably hamper the exercise of a judicial and sound discretion which the law allows to its medium of enforcement, *viz.*, the law courts. Section 544 gives power to one of several plaintiffs or to one of several defendants to appeal against the whole decree and a similar power is given to—be it noted it is not a duty imposed upon—the appellate court to reverse the decree in favour of all the plaintiffs or defendants as the case may be, "*if the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants.*"

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In the case before us, it is not disputed that the decree appealed against proceeded upon a ground common to both these defendants, that it was the plaintiff's vendor who had the right to sell and not defendant No. 2 who had no right to sell. The question is, whether, under these circumstances, the provisions of s. 544 apply to this case and whether under them we ought to exercise our discretion and power in favour of defendant No. 3.

The basis of the rule is, as can be gathered from the clear words of the section, a common ground of decision and not the sort of interest possessed by the parties. A principle enunciated by Jackson, *J.* in *Sreeram Ghatak* v. *Brajamohan Ghosal*(1) has been followed by eminent judges in the application of this section and was also quoted with approval by Plumer, *C. J.* in the case of *Ponambulam and another* v. *Syed Mahomed and another*(2). The learned judge's words are—"I think it is now quite clear that the decree which may be the subject of such an appeal must be one affecting in the same manner the whole of the plaintiffs or the defendants, *i. e.*, a decree incapable of division and upon which it would be impossible for the court to find in one sense for some of the plaintiffs or the defendants, and in the opposite sense for the other plaintiffs or the defendants." The words of s. 544 do not justify the importation of so many restrictive terms and I can only regard the ruling as describing a combination of circumstances or conditions under which the exercise of this discretionary power becomes very nearly a matter of imperative duty. It cannot be that it excludes all other condi-

(1) 3 B. L. R. App., 41. (2) 5 M. L. R., 537.

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tions under which this discretionary power may be exercised. The policy of the whole law of Civil Procedure is to prevent multiplicity of suits and to award and apportion relief to all the interested parties in the same suit. It is with this object that the Code gives to courts power to add parties, transpose their positions, allow different causes of action to be joined and in short to adjust all matters in dispute. The interpretation of a rule should be in furtherance of this policy and we have no right to import restrictions which the law does not warrant and which in effect thwart such policy. The exercise of discretion should not however be arbitrary and must depend more or less upon the circumstances of each case. One broad principle which ought to dissuade us from exercising this discretion is that a party who would claim the benefit of this section must also be under the corresponding disability of filing a separate appeal and questioning the correctness of the decision already arrived at in another appeal. Either the case must fall under Explanation 5 of s. 13 of the Code which seems to have been comprised in the principle laid down by Jackson, *J.*, or the party claiming it must, by his conduct, forego such right. Otherwise the defendant who now claims the benefit of the decree which is in his favour would try to avoid the effect of an unfavourable decision. A court ought, before exercising its discretion, to see that there is no such loop-hole allowed to a party for harassing the opposite party. The latest case of the Madras High Court, *Syed Hussain* v. *Madan Khan*(1) while emphasizing the principle laid down by Jackson, *J.*, it seems to me, illustrates this principle also.

(1) I. L. R., 17 Mad., 265.

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The facts of the case are not fully given. We do not know whether the defendant who claimed the plot *C* was on the record or not, and if he could not be bound by the decision when adverse to him, neither could he be benefited by it when favourable. The facts of the case before us are quite dissimilar: the appellant here avowedly proceeded from the very commencement under this section. He appealed against the whole decree and paid court-fees for the whole house. He brought defendant No. 3 on the record and thus an opportunity was given to him to be in court. It was explained to us by the Assistant Government Advocate that he could not join as a plaintiff on account of some inconvenience. The court was in a position to demand from him an assurance of finality even if the decision should have been adverse to him. The decision or the decree appealed against proceeded upon a ground common to both the defendants that the plaintiff was entitled to sue for the possession of the house. The very foundation of the joint action of the tort is the plaintiff's rightful possession and the alleged *joint* trespass by both the defendants. The decree appealed against proceeded upon the existence of such common ground. The requirements of s. 544 are fulfilled and the principles which ought to regulate the discretion of the court are all in favor of defendant No. 3. Under all these circumstances which are special to this case, I conclude that we shall advance the cause of justice and carry out, consistently with the plain policy of the law, the expressed intention of s. 544 if we allow defendant No. 3 also the benefit of the decision of

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this court and reverse the whole decree of the lower court.

THUMBOO CHETTY, *C.J.*—If the decree of the Munsiff was capable of being executed separately against defendant No. 3 as regards the portion sold to him, I should have had no hesitation in holding, following the Madras decision in *Syed Hussain* v. *Madan Khan*(1), that we cannot reverse the decree as against defendant No. 3 who has not appealed; but as the Munsiff's decree is against defendants Nos. 3 and 4 jointly, and does not direct each defendant to make over the share in his separate possession and enjoyment of plaintiff; and as the decree, if affirmed, has to be executed against both defendants jointly and provides for restoration of the suit-property as a whole, I agree in the opinion of the majority of the court that defendant No. 4 is entitled to avail himself of the provisions of s. 544 of of the Code of Civil Procedure and to ask for the reversal of the whole decree affecting himself and defendant No. 3.

Appeal allowed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1894 Oct. 30

CHENA SETTY (DEFENDANT No. 1) *v.* VENCATASA BHATTA AND ANOTHER (PLAINTIFFS).*

Usufructuary mortgage—Redemption—Second mortgage—Suit—Civil Procedure Code (Act XIV of 1882), s 43.

In a suit for redemption of a mortgage, the mortgagee claimed to be repaid monies expended by him in payment of *jodi* due to Government. The claim was resisted on the ground that in a previous suit upon a second mortgage between the same parties executed subsequently to the first, no claim on account of the *jodi* had

* Appeal No. 35 of 1894-95, against the decree of Mr. P. Vencata Rao, Additional Munsiff of Bangalore, in O. S. No. 559 of 1893, dated the 30th day of June 1894.

(1) I. L. R. 17 Mad., 265.

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been put forward and the mortgagee was therefore barred from now urging it, under s. 43 of the Code of Civil Procedure.

Held, that the mortgagee was not barred. Section 43 of the Civil Procedure Code does not deprive a defendant of any defence justly open to him, though it bars a fresh suit. In the present case the obligation to pay *jodi* was not provided for by the document sued on; and a decision either way would not contradict or be opposed to its terms. The mortgagee was therefore entitled to repayment of what he had paid for *jodi*.

Mr. *B. Nanjundappa* for the appellant.

Mr. *S. Narayana Rao* for the respondents.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

This was a suit for redemption of a mortgage. The point in dispute between the parties was in regard to the liability of the mortgagors to pay the *jodi* which was due to Government. The mortgagee contended that he paid the *jodi* since 1880 and that the mortgagors were bound to repay him the money he had paid to Government. The contention on the other side was, that the instrument of mortgage did not impose any liability upon the mortgagors.

This was a usufructuary mortgage. Eleven years after the date of the mortgage, the plaintiffs borrowed another sum of Rs. 200 from the defendant and made a second mortgage of the same village, and agreed to pay the *jodi* themselves. The defendant put the second mortgage bond in suit and obtained a decree for money in 1887. He did not then put forward his claim for repayment of *jodi*. The plaintiffs' case was, that the claim which has been put forward by the defendant was not cognizable, and that as it was not urged when the suit was filed in 1887, s. 43

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of the Code of Civil Procedure was a bar to it. This view has been accepted by the Munsiff and the defendant's claim disallowed.

The point which the Munsiff had to determine was, whether the mortgage in suit rendered the mortgagors liable to pay the *jodi*. If the liability was clear, it was no answer to the defendant's claim that the money paid for *jodi* had not been claimed in the suit which was filed by the defendant in 1887. If the defendant could have demanded payment in 1887, his omission could not prevent him from insisting upon the plaintiffs performing their duty, since s. 43 of the Code of Civil Procedure bars a fresh suit but does not deprive a defendant of any defence which is justly open to him to urge. Secondly, if the section operates as a bar, the defendant might not have been in a position to demand what had been paid by him before he filed the suit in 1887. The money which he paid since 1887 might be claimed in this suit, if the defendant proves his right to recover it.

Whether the defendant has established his right to the money is the question for determination. The document sets out that, in consideration of Rs. 200 lent by the defendant, the plaintiffs put him in possession of their share of the village and empowered him to enjoy the produce of that share in lieu of interest. Whether the obligation to pay *jodi* devolved upon the mortgagors or the mortgagee was not a matter which was provided for by the document; and a decision either way would not contradict or be opposed to its terms. The amount lent and the estimated value of the mortgagor's share of produce would throw some light upon the question. The *jodi* payable by

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the plaintiffs was Rs. 41 odd, and the sum borrowed by them was Rs. 200. We gather from the terms of the second mortgage that they remained in possession of the village upon an agreement to pay rent to the mortgagee at the rate of Rs. 26 a year. This would give the mortgagee interest at 13 per cent. per annum. If he was bound to pay *jodi*, he would lose interest and in addition pay Rs. 16 out of his pocket every year. This fact is sufficient to show that it could not have been in the contemplation of the parties that the mortgagee was to pay the *jodi* and appropriate what was left of the produce towards the payment of interest. This view is confirmed by what the plaintiffs did for many years after the date of the mortgage. They continued to pay the *jodi* for about eleven years, which they would not have done if they were not bound to do it. We are of opinion that the defendant's contention was right, and that he was entitled to be repaid what he paid for the benefit of the mortgagors.

Appeal allowed. Decree modified.

Before A. Ramachendra Iyer and O. Meenacshaya, Judges.

June 17.

PAYASAM HANUMUNTHU AND FOUR OTHERS (PLAINTIFFS) *v.* Y. SRINIVASA RAO, EXECUTIVE ENGINEER, KOLAR, AND ANOTHER (DEFENDANTS).*

Suit against public officer—Damages—Cause of action.

The Public Works Department made a road to a village, the cost of which was levied from the villagers. Subsequently the Executive Engineer considered a drain by the side of the road necessary, the making of which was complained of by the villagers: and they sued the Executive Engineer and two of his subordinates for its removal or for damages on account of constructing it. No

* Appeal No. 7 of 1894-95, against the decree of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, in O. S. No. 508 of 1891, dated the 19th day of March 1894.

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imputation of negligence or malice was made. *Held*, there was no cause of action. The Executive Engineer was the best judge of the requirements of the situation and if he committed an error of of judgment, he might be set right by his departmental superior: but no suit would lie against him personally. The plaintiffs had not proved their claim for refund of money paid for making the road. There was no failure of consideration, as a road had been made: and there was no agreement that if it were not made in a particular manner the cost should be refunded.

Mr. *D. Venkataramia* for the appellants.

Mr. *S. Ramaswamier* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

This was a suit against the Executive Engineer of Kolar and two of his subordinates employed in the Department of Public Works, and the relief sought was to compel them to remove a drain which they had made by the side of a road or to pay damages.

There was a cart track in the plaintiffs' village which they used for carrying manure to their fields. They wished to have a fairly good road and they applied to the Public Works Department to do the work. A road was made and the cost thereof was levied from the plaintiffs. The defendants found that the road was a nuisance to Madigars and others whose huts were situated in the neighbourhood, and accordingly they made a drain by the side of the road. This is the tortious act alleged in the plaint. If the Executive Engineer of the District in the exercise of his discretion considered that a particular drain was needed by the side of a particular road for the better protection of the road and of the houses situated in the neighbourhood, it is hard to perceive how he could be said to have committed a wrongful act, *i. e.*, an invasion of the plaintiffs' legal right. He was the

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best judge of the requirements of the situation, and if he committed an error of judgment he might be set right by his departmental superior. There is no proof that the drain was made in such a negligent manner as to cause of loss to the plaintiffs, or that it was made with the deliberate and corrupt intention of injuring them. In fact, there is no imputation made personally against either defendant. The only averment which was made against defendant No. 1 is, that he gave his sanction to the proposal which was made by defendant No. 3; and as against the latter it was alleged that he had yielded to the representations which had been made by the plaintiffs' enemies. The record does not show that the defendant did not honestly believe that a drain was needed. When he pleaded that if he was to be made personally liable for a wrongful act alleged to have been committed by him, he ought to have had previous notice of the suit, the plaintiffs answered that he was sought to be made liable simply as defendant No. 1's agent. This itself shows that the plaintiffs had no complaint personally against the defendants.

The plaintiffs have not proved their claim for refund of the money they had paid for making the road. There was no failure of consideration for they admit that a road was made by the defendants. There was no agreement that if the road was not made in a particular manner the plaintiffs were entitled to have their money back.

We confirm the decree and dismiss the appeal with costs payable to each defendant separately.

Appeal dismissed with costs.

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1895 Feb. 13.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

SUBBIA (PLAINTIFF) *v.* NARASIMA BHUTTA AND ANOTHER (DEFENDANTS).*

Hindu widow—Mortgage by—Rights of Mortgagee after her death—Reversioner—Stranger.

Where land had been mortgaged by a Hindu widow and after her death the mortgagee brought a suit against a rent-paying ryot to compel the latter to pay rent to him instead of to a co-defendant who claimed the land as purchaser at a court-sale, *Held,* that although, as a general rule, a Hindu widow has only a qualified interest in property inherited from her husband, she may under some circumstances confer an absolute title on her vendee. Her right to do so can only be determined at the instance of the reversionary heir and not on the objection of a stranger who claims adversely to her and her late husband. *Further,* as against a stranger the mortgagee could succeed on establishing the widow's title to the property.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

Before deciding this appeal we deem it essential to ascertain some additional facts.

It was admitted by defendant No. 1 that in execution of the decree which he obtained against the deceased Rama Bhutta only the latter's half share in the suit *vritti* was sold and purchased by defendant No. 1, and that Neelam Bhutta's remaining half share was exempted from attachment and sale. Defendant No. 1's advocate stated that as Neelam Bhutta sold the family house, including Rama Bhutta's half share, defendant No. 1 was allowed to take possession of and enjoy Neelam Bhutta's half share of the *vritti* since 1876.

The inam title deed, dated the 1st April 1880,

* Appeal No. 53 of 1894-95, against the decree of the Munsiff of Bangalore, in O. S. No. 658 of 1893-94, dated the 22nd day of June 1894.

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appears to have been issued subsequent to the court-sale of 1876 and sets forth the shares allotted to Rama Bhutta, Neelam Bhutta and defendant No. 1 and others. A reference to the proceedings held before the Inam Department and the statements filed by the parties will show whether subsequent to the court-sale the whole share of the suit *vritti* owned by Rama Bhutta and Neelam Bhutta was allotted to and registered in defendant No. 1's name or only the half share actually sold by the court. The Munsiff is directed to examine the parties on this point and after referring to the original statements filed before the Inam Superintendent, submit the additional evidence taken by him with his opinion whether, at the Inam Settlement the title of defendant No. 1 was confirmed with regard to the half or full share of the suit *vritti* land.

Another point which requires elucidation is, what is the combined quit-rent payable on the suit *vritti*, and whether defendant No. 1 alone paid the quit-rent due on the entire share, or only a moiety thereof and, in that case, whether the other moiety was paid by Neelam Bhutta and his widow Seethama.

A return to this order should be made within a month from the date of its receipt.

June 17.

The Judgment of the Court was as follows:—

The plaintiff claimed under a mortgage bond which was executed in his favour by Savithrama, deceased. He alleged that the Hulgaval land in suit was mortgaged to him and was the property of the mortgagor. It was the mortgagor's undivided share of the Maddyaka land, *i. e.*, land held by the *vritti*-

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dars as common property. The plaintiff alleged that defendant No. 2 was the ryot who cultivated the land under the *vrittidars*, and was bound to pay each his proportionate share of the rent. His refusal to recognize the plaintiff's claim, and the adverse right alleged by defendant No 1, was the cause of action mentioned in the plaint. The prayer was, that the plaintiff's right should be upheld and that defendant No. 2 should be ordered to pay rent to him and not to defendant No. 1.

The Munsiff of Bangalore dismissed the suit on two grounds. The mortgagor, who was a widow, having died before the date of suit, the plaintiff had no right to the property. He was of opinion, upon the evidence, that defendant No. 1's title was superior to that of the mortgagor.

The objection which has been taken to the plaintiff's title is untenable. It is not the law that any alienation made by a Hindu widow ceases to be operative at her death. It is true that, as a general rule, she possesses only a qualified interest in the property which she inherits from her husband. She may, however, confer an absolute title upon her vendee under certain circumstances. It is a question of fact which the court has to determine at the instance of a party who is interested in raising it, *viz.*, the reversionary heir. Until and unless it is so raised and determined against the vendee or mortgagee, he has a valid title to the property and it ought to be upheld by a court of justice. In the case before us, the reversioner is not a party, and the decree will not, of course, bind him. The party who resists the suit is a stranger whose claim was adverse to the right

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alleged by the widow and her late husband, and as against him the plaintiff is entitled to a decree if he can succeed in establishing the widow's title to the property.

* * *

The evidence is sufficient to sustain the title alleged in the plaint. Defendant No. 1 having received the rent from defendant No. 2 will be decreed to pay to the plaintiff the amount claimed by him and costs throughout.

Appeal allowed with costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

June 17.

THAMIA (PLAINTIFF) v. DEPUTY COMMISSIONER, MYSORE DISTRICT (DEFENDANT).*

Water assessment—Right to adequate supply of water for cultivation—Damages—Suit against Deputy Commissioner—Cause of action—Proper remedy.

A land-owner paying wet assessment upon his land sued the Deputy Commissioner of the District on the ground that neither the Public Works Department nor the Revenue Department supplied him with water for cultivation whereby he was unable to raise any crop, and he claimed as damages the value of the produce he might have reaped had the Deputy Commissioner supplied him with water. There was no allegation of any tortious act by the Deputy Commissioner. ***Held,*** **there was no cause of action. The imposition of wet assessment on a field does not imply a contract between the owner of the field and the Government obliging the latter to supply water to the former and for breach of which a suit would be a matter of course. It does not impose upon the Government an absolute duty the omission to perform which carries a liability to pay damages. The proper remedy is to appeal to the Government to revise the rate of assessment or make better arrangement for distribution of water.**

Mr. *D. Venkataramia* for the appellant.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA) was as follows:—

The plaint alleged that the plaintiff was owner of

* Appeal No. 305 of 1894-95, against the decree of the District Judge of Mysore, in O. S No. 12 of 1894.

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land bearing survey No. 53 in Brahmapura village, that there was no adequate supply of water for cultivating it, that, nevertheless, a wet assessment of Rs. 16 was imposed upon it, which was in excess of the former rate, that neither the Public Works Department nor the Revenue Department supplied him with water for cultivation, and that he was not able to raise any crop. The suit was filed against the Deputy Commissioner of the District, and the relief claimed in the plaint was the value of the produce which the plaintiff might have reaped if the defendant had supplied him with water.

The District Judge of Mysore dismissed the suit. The plaintiff has appealed from the decree.

The defendant has raised several questions of law which we have not considered it necessary to discuss, since we are of opinion that assuming the correctness of the fact stated by the plaintiff, the plaint discloses no cause of action against the defendant. The imposition of wet assessment on a field does not imply a contract between the owner of the field and the Government, which obliges the latter to supply water to the former and, for breach of which, a suit would be as a matter of course. Nor does it impose upon the Government an absolute duty the omission to perform which carries a liability to pay damages. So far as we are able to judge the alleged right of plaintiff to claim damages for loss of produce does not seem to rest on a legal basis. If the assessment is unreasonably heavy and if there has been no adequate supply of water, the plaintiff's remedy is by way of appeal to the Government to revise the rate of assessment or to make better arrangement for distribution of water.

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There is no allegation in the plaint that the defendant had rendered himself personally liable by a tortious act. We confirm the District Judge's decree and reject the appeal.

Appeal dismissed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1894 *Nov.* 23.

GOSAY GOWDA (PLAINTIFF) *v.* 1. CHICKA PAPANA (SINCE DECEASED) BY HIS SONS MUDIA, MADIA AND PUTA MADA, MINORS, BY THEIR GUARDIAN THIMANA AND 2. F. W. SMITH (DEFENDANTS).*

AND

CHICKA PAPANA (SINCE DECEASED) BY HIS SONS MUDIA, MADIA, AND PUTA MADA, MINORS, BY THEIR GUARDIAN THIMANA (DEFENDANT) *v.* GOSAY GOWDA (PLAINTIFF).*

Joinder of parties—Civil Procedure Code (Act XIV of 1882) s. 32—Disclaimer of interest by added defendant—Joint and several contract—Cross-claim for damages—Contract Act (IX of 1872) s. 74—Measure of damages—Necessity for proof—Interest.

A contracted to supply to *B* and *C* 1,300 maunds of jaggery a month under a penalty of eight annas a maund as damages. He supplied a smaller quantity than that contracted for and *B* and *C* declined to pay for what was supplied. *A* sued *B* only for the price of what had been supplied with interest. *B* contended that *C* must be joined as co-defendant or the suit be dismissed; and also counter-claimed for damages at eight annas a maund on the quantity not delivered.

Held, that the contract was joint and not joint and several and that *C* should be joined, but that his non-joinder was no reason for dismissing the suit, as under s. 32 of the Civil Procedure Code the court could make an order bringing him on the record and for the pleadings to be amended. *Further*, that as *C*, on being served with notice, disclaimed all interest in the suit and did not desire to be added as a party, he could not be compelled to join in the litigation and the plaintiff might proceed against *B* alone.

Held also, that although the contract named eight annas a maund as the rate of damages, the party claiming it was bound to prove

* Appeals Nos. 190 and 198 of 1893-94, against the decree of Mr. M. Ramaswamier, Subordinate Judge of Mysore, in O. S. No. 53 of 1892, dated the 3rd day of November 1893.

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what damage he had suffered and under s. 74 of the Contract Act, the court could decree compensation for the loss actually suffered within the contract rate. Damages arising from contract are different from those arising from a tort. The former must be and can be proved particularly, although the latter in many cases cannot and must be left to the absolute discretion of the court. In the case of non or partial delivery of goods, the measure of damages is the difference between the contract price and the market rate of similar goods on the date when delivery ought to have been made and this is capable of strict proof, which as *B* had not given he could not recover damages. *A* was therefore held entitled to recover the price of the jaggery delivered and interest thereon from the date the money was claimed and default made in payment.

Mr. *B. Srinivasa Iyengar* for the appellant.

Mr. *C. Raja Row* for the appellant.

The Order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) was as follows:—

This was a suit for price of jaggery supplied by the plaintiff and for damages caused by the defendant's refusal to perform his part of the contract. One of the pleas urged by the defendant was, that the suit was bad for non-joinder. The objection was overruled by the Subordinate Judge and the case was decided on the merits. Both parties have preferred appeals from the decree. The defendant, having reiterated his objection to the suit on the ground of non-joinder, we proceed to consider it before we enter upon the merits.

The suit was based upon a contract between the plaintiff on one side, and the defendant and Mr. Smith on the other side. The plaintiff bound himself to deliver a certain quantity of jaggery at a certain price, on the dates specified in the contract and in default to pay damages. The contract contained mutual independent covenants, and either

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party might maintain a suit against the other for damages for its breach. If there was a breach, of which the plaintiff complained, he was, *primâ facie*, bound to bring on the record the parties who had contracted with him and failed to perform their contract. The liability was joint and not joint and several. If there were no mutual covenants, if the obligation lay on one of the contracting parties only, as in a contract of loan, the obligee might sue one of the obligors, waiving his claim against the others. If, in the present case, we allow the plaintiff to proceed against the defendant alone, the result will be to shut out Mr. Smith from asserting his claim hereafter, and to make an adjudication which will bind the defendant and Mr. Smith, without giving the latter an opportunity to assert and prove his claim. When a contract is put in suit and a decree is made, there can be no second suit. If the defendant does not honestly and intelligently press his claim, Mr. Smith will be prejudiced thereby, when he has had no notice and no opportunity to protect his interests. There is then every reason to compel the plaintiff to bring Mr. Smith on the record, and we are not aware of any authority which gives a right to the plaintiff to choose his own defendant in a case like the present. We are of opinion that the Subordinate Judge ought to have allowed the objection urged by the defendant.

We are not, however, prepared to endorse the defendant's contention, that the suit ought to be dismissed on that ground. The Civil Procedure Code does not contain an explicit provision that a suit shall be dismissed on the ground of non-joinder. As it

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seems to be the policy of the Procedure Code to allow a wide discretion to the courts so as to prevent a suit being dismissed on technical grounds and to enable a court to dispose of every suit, as far as practicable, on its merits, we are of opinion that the power which is conferred upon us by s. 32 may be exercised by us in this case. We direct that the plaintiff do amend the memorandum of appeal within fifteen days, so as to make Mr. Smith a party to the appeal and apply for summons to be served on him. We will give further directions after hearing Mr. Smith.

1895 *June* 17.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

By our judgment dated 23rd November 1894, we directed the plaintiff to serve a notice on Mr. Smith. Our intention was to ascertain whether he had a substantial interest in the matter in suit and what he had to say to protect his interest or that of the firm. He has appeared by an advocate and informed us that he has no interest in the suit and has no wish to be made a party.

The defendants' advocate contends that Mr. Smith ought to be made a party, that if he is brought on the record, the suit against him is out of time, and that if the suit is barred against one partner, it ought to be dismissed against the other partner also. In support of his contention, he has referred us to the cases of *Khadir Moideen* v. *Rama Naik*(1), *Ramdoyal* v. *Junmenjoy Coondoo*(2), *Ramsebuk* v. *Ramlall Koondoo*(3), *Damodardass Haridas* v. *Uttam Chand Savia Chand*(4) and *Habib-ul-lah* v. *Achaibar Pandey*(5). The judg-

(1) I. L. R. 17 Mad., 12. (2) I. L. R., 14 Cal., 791.
(3) I. L. R., 6 Cal., 815. (4) I. L. R. 7 Bom., 217.
(5) I. L. R. 4 All., 145.

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ment in *Khadir Moideen* v. *Rama Naik*(1) shows that the two plaintiffs in that suit sued as representatives of their deceased brother, that they had another brother who did not wish to join with them in filing the suit and who was included among the defendants, and that during the progress of the suit the District Judge made an order that the remaining brother instead of being made a defendant ought to be made a plaintiff. The High Court held that there was no irregularity and that s. 22 of the Limitation Act did not apply, when the Court of its own motion acted under s. 32 of the Code of Civil Procedure. If the judgment applies at all to the case before us, it is an authority for the proposition that the question of Limitation does not arise because the order to bring Mr. Smith on the record was made by us under s. 32 in order that substantial justice might not be defeated. The two Calcutta cases and the Bombay case referred to decided that the plaintiffs in those suits were in conjunction with others entitled to the relief claimed by them, and that the suits which they filed without making those who were jointly interested with them parties were bad and ought to be dismissed. These are distinguishable from the present case. The plaintiffs in those cases had by their own showing no right to the relief which they claimed. The right to relief existed in them and others jointly and it is obvious that *A* alone cannot claim what *A*, *B* and *C* are entitled to recover. In the case before us the right to sue exists in the plaintiff, and what he claims is damages for

(1) I. L. R. 17 Mad., 12.

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breach of contract to pay for goods supplied. If he who is entitled to recover damages from two individuals chooses to claim from one alone and to forego his claim against the other, he cannot be forced to bring the other on the record; because the defendant's right to claim contribution from his partner or to settle accounts in accordance with the terms of the partnership is in no way affected by the procedure adopted by the plaintiff. If the plaintiff had performed his contract and if the question was simply whether the defendant had or had not performed his contract, the question of defect of parties could not arise in the case. The plaintiff however having committed breach of his contract, the defendant was entitled to plead it in mitigation of damages or to file a counter-claim. An adjudication of his claim would bind the partner who was not before the court, and it was just in our opinion to give the absent partner a reasonable opportunity to state his claim. The order was made for the benefit of Mr. Smith, and when he has disclaimed interest, he need not be brought on the record. If he insisted upon being heard, the question of limitation might arise. The defendant cannot insist upon his partner being brought upon the record, because as we have already observed the rights of the partners as between themselves are not affected by the decree. The Allahabad case was a suit to enforce the right of pre-emption and virtually an action of ejectment.

It was very properly decided that all those persons who were in possession as subsequent purchasers and who might be ejected if the plaintiff succeeded ought to have been made defendants. The prelimi-

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nary objection which was raised by the defendant being disposed of, we shall proceed to discuss the merits of the suit.

The plaintiff entered into a contract with the defendant on the 29th August 1890 for the supply of 1,300 maunds of jaggery a month at the defendant's distillery in Coorg. The contract was to remain in force until April 1891. If the plaintiff failed to perform his contract, he was bound to pay damages at As. 8 per maund. When jaggery was delivered at the distillery, the plaintiff was to obtain a receipt from the defendant's agent and produce it at the defendant's office in Mysore and receive payment. The plaintiff delivered in September and October 1890 jaggery less than what he had promised; the defendant failed to pay for it, and the plaintiff went on delivering jaggery in Coorg until June 1891. He sued for price of the jaggery together with interest thereon. The defendant contended that the plaintiff delivered less than 5,000 maunds when he ought to have delivered more than 10,000 and claimed damages at the rate mentioned in the document. The Subordinate Judge of Mysore awarded the defendant damages at As. 4 a maund, and deducting it from the amount due to the plaintiff gave him a decree for the remainder. Both parties have appealed from the decree.

The plaintiff contends that the defendant did not make out his claim for damages. The latter contends that the judge ought to have decreed according to the contract and that considering the nature of his business as abkarry contractor and the difficulty of procuring jaggery in Coorg, the stipulation to pay As. 8 a maund was not in the nature of a penalty.

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Although when the contract was made, the parties were agreed as to the measure of damages, yet the Contract Act s. 74 requires a court to award "reasonable compensation" not exceeding the amount named. The principle of law is that damages are to be a compensation and satisfaction for the injury sustained. The question is what is the injury which the defendant sustained by reason of the plaintiff's breach? "Where the action is by the vendee against the vendor for not delivering goods and no payment has been made, the measure of damages is the difference between the contract price and that which goods of a similar description and quality bore at the time when they ought to have been delivered. Because the plaintiff has the money in his possession and might have purchased other goods of a like quality the very day after the contract was broken. Where the contract is to deliver goods at certain specified periods, in specified quantities, this is in fact a set of distinct contracts; and as each period arrives, if no delivery or only a partial delivery takes place, the damages will be the difference between the contract price and the market price on that day of the quantity which ought to have been then supplied"(1). The defendant did not state the particulars of his claim for damages. He did not say where he had purchased jaggery to carry on his business and what price he had been compelled to pay. His gumasta deposed "as jaggery was not properly delivered, we were obliged to buy elsewhere. We sustained a heavy loss on this account. There are accounts to show

(1) Mayne on Damages, 167, 168.

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where and how much we bought from others, but those accounts are in Bangalore." In re-examination he stated "we have no accounts to show how much jaggery we purchased owing to short deliveries on the part of the plaintiff." The manager of the distillery had no personal knowledge. He said that the defendant purchased jaggery elsewhere and forwarded it to the distillery. The defendant's gumasta was examined on the 22nd August 1893 and the defendant closed the case on the 23rd after examining the manager of the business who as has been shown above gave no evidence relevant to the point under consideration. The accounts in which the purchases alleged to have been made by the defendant were entered were not produced and no evidence was given as to the market price of jaggery on the dates on which the plaintiff made default. Though all these points were noticed by the Subordinate Judge he nevertheless was of opinion that four annas a maund was reasonable compensation. He did not endeavour to give reasons for the conclusion which was not based upon evidence. Section 74 of the Contract Act no doubt gives discretion to a court, but then discretion must be guided by judicial principles and capable of correction by a court of appeal. If compensation is claimed for a wrong, the question must necessarily be left within loose limits. When it is claimed for non-delivery of goods, there need be no room for conjecture, the rules being so strict as to enable the court almost to dictate the amount as a matter of law. The defendant having adduced no evidence on the point, the demand for damages must be disallowed.

The defendant contends that the Subordinate Judge

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was wrong in allowing interest upon the price of jaggery from the respective dates of delivery at the distillery. We are of opinion that the contention is sound. We may refer here to what was said during the hearing as to the right of either party to rescind the contract. If as a matter of fact either party rescinded the contract by reason of the failure of the other party to perform his contract, it would be necessary to discuss whether performance by one party was a condition precedent to the performance by the other party of his part of the contract. The question does not arise in the case because the plaintiff alleged that he continued to deliver jaggery although he might have avoided the contract when the defendant failed to pay for what had been delivered in October 1890. When the plaintiff failed to deliver the contracted quantity, the defendant might have refused to receive any more. But he did not put an end to the contract and went on receiving month after month whatever the plaintiff chose to deliver. "If the buyer accept and retain the quantity delivered, whether in excess or defect of the contract, he would be bound to pay the price of the quantity accepted"(1). No question then arises as to the liability of the defendant to pay the price of jaggery. The question we have to determine is whether the price of goods is to be regarded as a debt from the date on which they were delivered so as to entitle the vendor to claim interest from the date of delivery. There was no stipulation for payment of interest. There was no evidence that the plaintiff produced the defendant's manager's receipts and claimed payment after each delivery. The letter which the plaintiff wrote in

(1) Leake on Contracts, 824.

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July 1891 demands payment of the price of 419 maunds then delivered and the price of goods delivered up to that date. Even then, interest was not claimed. When there was no agreement to pay interest and when there was no notice that interest would be charged if the price was not paid within a certain time, and when no interest was claimed in July 1891, we are of opinion that the Judge ought not to have allowed it up to July. The money was then claimed and the defendant committed default. We are of opinion that the plaintiff is entitled to interest from August 1891 and we modify the decree accordingly.

The other findings of the Subordinate Judge have not been shown to be erroneous and are hereby affirmed.

The sum which was payable to the plaintiff on the date of the plaint was Rs. 2,795 in round figures. He is entitled to interest thereon at six per cent. from the date of plaint until the date of payment. He will recover costs upon this amount in the lower court and the defendant will bear his own. He has gained Rs. 900 by his appeal to this court and he will get costs upon that amount only. It is true that the decree of the Subordinate Judge awarded to him Rs. 1,187 only. This was obviously a clerical mistake and he might have had it rectified by a petition in the court below. In order that there may be no confusion, we direct that the two appeals be consolidated and that one decree be drawn up.

Decree modified.

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1895 Sept. 9.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C.I.E., Chief Judge and C. Meenacshaya, Judge.

RAMA (DEFENDANT No. 1) *v.* NANJAMA (PLAINTIFF No. 1).*

Mother's right to inherit son's property—Unchastity.

A Hindu mother is not debarred from inheriting her son's property by reason of her unchastity.

Mr. *N. Cheluviengar* for the appellant.

Mr. *S. Narasimiengar* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

The only question which arises in this appeal and which was argued before us was, whether a mother would be debarred from inheriting her son's property on the ground of her unchastity. There is some conflicting evidence on the point whether the mother had led an unchaste life prior to the son's death or only subsequently: but in the view we take, it is unnecessary to record any finding on that point. In *Advigappa* v. *Roodravva*(1), the same question arose in regard to the rights of an incontinent daughter to succeed to her father's estate, and the learned judges in a very elaborate judgment decided that she was entitled to succeed. They held that the texts which required chastity as a condition precedent to succession applied only to widows succeeding to their husband's estate, and not to daughters. The grounds for the decision in favour of the daughter apply with equal force to the mother. In *Kojiyadu* v. *Lakshmi*(2), the rights of an unchaste mother were considered, as in the present case, and the decision

* Appeal No. 240 of 1894-95, against the decree of Mr. P. Singarachar, Munsiff of Bangalore, in O. S. No. 899 of 1893-94, dated the 29th day of September 1894.

(1) I. L. R. 4 Bom., 104. (2) I. L. R. 5 Mad., 149.

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of that court was in favour of the mother's rights. That case is on all-fours with the present case.

The judgment of the Privy Council in *Keri Kolitani* v. *Moniram Kolita*(1) was quoted before us by the appellant's advocate. The question before the Privy Council in that case was whether a widow, by her unchastity, forfeited property which she had previously inherited. On an examination of certain texts relied upon by the Calcutta High Court, their Lordships of the Privy Council, in deciding the question before them in the negative, remarked that it seemed clear to them that though an unchaste mother was excluded from inheriting her son's estate, it was not by virtue of the texts quoted.

This judgment of the Privy Council was fully considered by both the Bombay and Madras High Courts in the cases referred to by us.

The only ground of appeal failing, we dismiss this appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and C. Meenacshaya, Judge.

1895 *October* 7.

TOOLASI BOYEE (DEFENDANT) *v.* HARIACHAR (PLAINTIFF).*

Succession certificate—Act XXVII of 1860—Suit to have certificate cancelled and for declaration of right to monies.

A certificate under Act XXVII of 1860 to collect the debts due to her deceased husband was granted to a widow who was opposed by the brother of the deceased on the ground that the debts (monies in bank deposit and due on bonds) were the self-acquisition of the latter. The brother then sued the widow for cancelment of the certificate and for a declaration of his right to the monies;

* Appeal No. 303 of 1894-95, against the decree of the District Judge of Nandidroog, in O. S. No. 10 of 1893-94.

(1) I. L. R. 5 Cal., 776.

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and it was held by the District Court that the monies were the self-acquisition of the deceased and therefore his brother was entitled to them less a sum for which the widow had a lien upon them for maintenance. *Held* by the Chief Court that the suit was not maintainable. The brother could have appealed against the grant of the certificate, but not having done so the order granting it had become irrevocable and could not be cancelled by suit.

Further, he was entitled to, if anything, a decree for a specific sum and not to a mere declaration of right, a suit for which was therefore inadmissible.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *Ramaswamy Iyer* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and MEENACSHAYA, *J.*) was as follows :—

One Hanumantha Char, the elder brother of the plaintiff and the husband of the defendant, died issueless, on 4th April 1893, leaving in deposit in a Savings Bank Rs. 680 and three money bonds for Rs. 400, standing in his name. To recover these outstandings, the plaintiff applied for a certificate under Act XXVII of 1860. The defendant opposed the application on the ground that the sums outstanding were Hanumantha Char's own acquisition.

The District Judge after some enquiry, found that the two brothers had separate deposit accounts in the same Bank and carried on monetary transactions also separately, taking bonds in their own names, and that the defendant was, *primâ facie*, entitled to recover the outstandings. A certificate was accordingly ordered to be issued in the name of the defendant, subject to her furnishing the required security.

The plaintiff has filed this regular suit for a declaration that he is entitled to recover the amounts referred to in the first paragraph of this judgment, in preference to the defendant.

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The District Judge, on further enquiry, found that the plaintiff was entitled to the declaration prayed for, as the outstandings belonged to him, and were not the self-acquisition of the deceased Hanumantha Char. The decree, however, limited his right to the said outstandings by deducting therefrom Rs. 450, which the plaintiff allowed for the maintenance of the defendant. The defendant was adjudged to bear the plaintiff's costs.

The defendant has preferred this appeal.

We are unable to support the decree of the District Judge.

The suit in the form in which it has been brought is, in our opinion, not maintainable. It was open to the plaintiff, if he was dissatisfied with the order of the District Judge granting a certificate to the defendant under Act XXVII of 1860, to have appealed against that order and to have it set aside in his favor. Having failed to do so, the order for the grant of the certificate became final. The certificate was only an indemnity or protection to debtors, and did not deprive the plaintiff of his right to sue for, and recover from, the defendant the amount which she was empowered to collect under Act XXVII of 1860. The defendant was required to furnish security, so that the plaintiff was sufficiently protected against any mis-appropriation of the sums collected by the defendant. But instead of suing to recover from the defendant what was actually due to him, minus the amount of maintenance to which the defendant was entitled, and in respect of which she had a lien on the outstandings in question, the present suit was brought for a mere declaration of right. This was inadmissible. If the

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plaintiff's allegations be true, he was entitled to a decree for a certain sum from the defendant, and not for a mere declaration of his right. The cancellation of the certificate granted to the defendant was unnecessary. If, under that certificate, the defendant recovered any sums and the plaintiff was entitled to payment of the whole or any portion thereof, he ought to have sued for substantial relief on that account, and have asked for a money decree against the defendant for a specific and ascertained amount.

Whether the certificate was rightly granted to the defendant or not cannot be tried in this suit; for that question was decided against the plaintiff in the certificate case, and that decision not having been appealed against or set aside, became final.

In this view, we are obliged to set aside the decree of the District Judge in this suit, and to dismiss the plaintiff's suit with costs throughout.

Appeal allowed with costs.

1896 *Jan.* 30.

Review—Suit for declaratory decree as foundation for relief to be obtained out of court—Appeal regarding items beyond scope of original decree—Promise by party embodied in decree—Second application for review.

A review of the preceding judgment having been applied for on the ground that the object of the plaintiff was to use the declaratory decree to obtain money from the Savings Bank and as the defendant had received no monies he could not sue for recovery of such, it was *held* that, under the circumstances, the plaintiff was entitled to sue for a bare declaration, the review should be allowed and the appeal dismissed with costs. *Further held*, that the objection to the form of the suit regarding certain bonds need not be considered, as the decree of the lower court was substantially limited to the amount deposited in the Savings Bank. *Also*, that as the plaintiff made an unqualified promise to pay Rs. 450 to the defendant which was embodied in the decree, and no appeal had been preferred from that portion of the decree, the court had no power to rescind the direction or examine its propriety.

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On a subsequent application for review in regard to the monies due on the bonds, *Held* that as the first judgment on appeal dismissed the suit without any reservation and the second judgment limited the enquiry to the right to the deposit in the Savings Bank, it was too late to consider whether the court was right or wrong in excluding the remainder of the suit from consideration. The first judgment in regard to that point of the case was practically confirmed by the second and to consider it afresh would be virtually granting a second application for review by the same party, which the court declined to do.

An application having been made for Review of the preceding Appellate Judgment, the following Order was thereon passed by MEENACSHAYA, *J.*:—

I am of opinion that there is sufficient reason for admitting this application for review. This suit was instituted for a declaration of the plaintiff's right to recover a certain sum of money deposited in the District Savings Bank and other sums due by third parties on promissory notes. The District Judge who tried the suit decreed in favour of the plaintiff. This court in appeal dismissed the suit on the ground that the suit for a mere declaration was not maintainable. It is urged in support of the review petition that the defendant to whom a certificate under Act XXVII of 1860 was ordered to be granted, has not obtained the certificate, and has not even furnished the security ordered preliminary to obtaining the certificate, and that the only means by which the plaintiff can obtain the money from the Savings Bank is by producing a declaratory decree from the court that he is entitled to receive it. This point does not appear to have received due attention. I admit the application for review and direct under s. 630 that the appeal be re-posted for hearing before a Bench of two Judges of the Civil Procedure Code,

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1896 April 1.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) on the Review was as follows:—

The plaintiff alleged that he and his late brother, Hanumantha Char, were undivided brothers, that he had deposited Rs. 700 in the Government Savings Bank in the name of the deceased, and had lent money to several persons through him the bonds for which were in his custody. He prayed for a declaration of his title to the moneys aforesaid, the reason for filing the suit being that the District Judge had made an order for granting a certificate to the brother's widow under Act XXVII of 1860. The District Judge made a declaratory decree as prayed by the plaint. The defendant has appealed.

The objection first urged by the appellant's advocate was that the plaintiff ought not to have sued for a bare declaration. It is not alleged that the defendant has received the deposit from the Secretary of the Savings Bank or that she has received the moneys due from the debtors. It is obvious that the plaintiff has no right to sue the defendant for money. The object of the suit is to obtain a decree which may be made the foundation of relief to be got from the Secretary of the Bank, and so far as that matter is concerned there can be no objection to the form of the suit. See *Sadut Ali Khan* v. *Khajeh Abdool Gunnee and two others*(1). The objection which was urged to the form of the suit regarding certain bonds need not be considered, for we find that the decree of the lower ourt was substantially limited to the amount which had been deposited in the Savings Bank.

(1) L. R. Ind. Ap. Sup., 165.

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Upon the merits, we are of opinion that the Judge's conclusion was right. There was no evidence to prove division; on the other hand, there was overwhelming evidence to the effect that the brothers were undivided. The defendant made no attempt to prove that the whole or any part of the deposit was her husband's self-acquired property. The evidence which was adduced by the plaintiff was unrebutted and it may be gathered from it that the money was the self-acquisition of the plaintiffs or that both brothers jointly acquired it. In either view, the right of the plaintiff to get money which was deposited in the Savings Bank cannot be disputed by the defendant. The object of the suit being to enable the plaintiff to obtain the money deposited in the Bank the decree of the court will explicitly state that he is entitled to recover from the Bank Rs. 693-7-5 deposited by the late Hanumantha Char.

The plaintiff alleged that the defendant did not apply for maintenance, that the District Judge was wrong in providing for payment thereof, and that the defendant having shown that she did not acquiesce in the decree, the provision which was made by the Judge ought to be rescinded. The Judge's notes show that the plaintiff made an unqualified promise to pay Rs. 450 to the woman for and on account of maintenance, although he said that she had no legal claim upon him and the promise was embodied in the decree. This portion of the decree has not been appealed from, and we have no power to rescind it or to examine the propriety of the direction made by the District Judge. The appeal fails and is dismissed with costs.

Review allowed. Appeal dismissed with costs.

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1896 *August* 14.

Subsequent applications for review and a miscellaneous appeal having been made, the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) made the following final order:—

These two petitions and miscellaneous appeal arise from the same suit and they may be disposed of by one order. The question which was discussed in the final judgment in appeal No. 303 of 1894-95 was the right of either party to the suit to recover the money which was deposited in the Savings' Bank in the name of the deceased brother of the plaintiff. The right to recover the remaining sum of Rs. 400 was not considered, it may be because it was supposed that it had been decreed to the defendant or it was not pressed in review. The decree which was passed by the District Judge shows that he simply awarded to the defendant a sum of Rs. 450 and that he did not specifically assign to her all or any of the bonds regarding which a declaration of right was sought by the plaintiff. The first judgment which was passed by this court dismissed the suit without any reservation. The second judgment limited the enquiry to the right to the deposit in the Savings Bank. It is now too late to consider whether the court was right or wrong in excluding the remainder of the suit from consideration. The first judgment in regard to this part of the case was practically confirmed by the second judgment and if we proceed to consider the point afresh, we shall be virtually granting a second application for review by the same party. We decline to grant another review. But we notice that the decree is not in accordance with the judgment. The decree will be amended by declaring

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that the plaintiff's right to receive the deposit is established and that the court declines to make a declaration in respect of any bond.

The plaintiff did not make an appeal from the order granting a certificate to the defendant. After the dismissal of his suit by the first judgment delivered by this court, he made an appeal from the order which he subsequently withdrew. He has now made another appeal from the same order, which in the circumstances above stated cannot be admitted.

We see no reason to amend the table of costs annexed to the District Judge's decree. If an amendment is needed, we are inclined to think that it is in the table of costs annexed to the decree of our court.

We direct each party to bear his costs of these applications.

Applications and appeal dismissed.

1895 Oct. 28.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

AKAMA (PLAINTIFF) v. PUTTAIYA (DEFENDANT).*

Hindu Law—Minor wife—Guardianship—Husband—Mother—Custom.

A husband who is of full age is by Hindu law the guardian of his minor wife; his rights as such are superior to her mother's and no other guardian can be appointed. The practice of girls living with their parents until the age of puberty is founded upon custom and being an exception to the general rule must be specially pleaded and proved.

Mr. *S. Ramaswamier* for the appellant.

Mr. *Ramaswamy Chetty* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

This was a suit by a Hindu mother to obtain pos-

*Appeal No. 325 of 1894-95, against the decree of Mr. P. Singarachar, Munsiff of Bangalore, in O S. No. 119 of 1894-95, dated the 20th day of December 1894.

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session of her daughter. The girl was married to defendant No. 4 about two years ago, and when the plaint was filed, she was living with her husband's mother and under his protection. The relief claimed by the plaintiff was founded on the allegation that the girl was a minor, about ten years old, and that the mother was the child's natural guardian. The husband alleged that the plaintiff was a woman of immoral character and objected to the girl being left under her protection. The Munsiff of Bangalore was of opinion that the defendant's allegation was true and dismissed the suit. The plaintiff has appealed on the ground that the finding was erroneous.

The first question which we have to decide is, whether the mother or the husband is recognised by Hindu Law as guardian of the girl. The law, according to Manu and Yagnavalkya, is that a girl must be protected by her father so long as she is a maiden, and that when she is married his authority ceases and the husband becomes her protector and guardian(1). It makes no difference whether the girl has or has not attained the age of majority(2). The rule of law has been adopted by the Rules which are in force here relative to the Custody and Guardianship of Minors. Rule 8 is as follows:—"No appointment shall be made of a guardian of the person of a female minor whose husband is not a minor, and if a guardian be appointed to take care of the person of a female minor, whose husband is a minor, such guardianship shall cease as soon as the husband shall attain the age of majority." It has been stated that the husband of

(1) Colebrooke's Dig. Book IV, Ch. 1, vv. 5, 6. *See also*, Vyavastha Chandrika, II, 603; and Hindu Law, by West and Buhler, 232.
(2) Hindu Law, Battacharya's, 123.

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the girl is more than twenty-one years of age. We are not unaware that in certain cases girls live with their parents until the age of puberty. This is founded upon custom and, being an exception to the rule, it must be specially pleaded and proved. The plaintiff did not rest her right upon custom.

If there was nothing in the evidence to cast a stain upon the plaintiff's character, we might be inclined to direct further enquiry regarding the custom of the caste. It is admitted that she has been cohabiting with a *Sivachar* man and the husband contends that he might lose caste were he to send his wife to live with her mother. We confirm the Munsiff's decree and dismiss the appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and A. Ramachendra Iyer, Judge.

July 1.

BYRAPA (DEFENDANT) v. GIRIGANA (PLAINTIFF).*

Right to trees—Payment of malki assessment—Power of Revenue Authorities to transfer right to trees—Land Revenue Code, s. 41.

Where the owner of land had been in enjoyment of a tree standing thereon for some forty years, the mere fact that at the Survey Settlement the tree was included in the land of another man who had for three years been allowed to pay the *malki* assessment in respect of it, did not and could not confer any right upon the latter.

Under the Land Revenue Code, s. 41, Government has power to transfer to the occupant of land the right to trees thereon under certain conditions, but no power is given to confer such rights on persons who are not occupants of the land.

Mr. *S. Ramaswamier* for the appellant.

Mr. *S. Narayana Row* for the respondent.

*Appeal No. 25 of 1894-95, against the decree of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, in O. S. No. 90 of 1893-94, dated the 22nd day of May 1894.

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The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) were as follow :—

THUMBOO CHETTY, *C.J.*—The plaintiff sued to establish his right to a tamarind tree valued at Rs. 5, and to recover two and a half maunds of tamarind valued at Rs. 5. The plaintiff, it is alleged in the plaint, has been enjoying the produce of the tree for the past forty or fifty years, and the cause of action is said to have arisen in January 1893, when the defendant wrongfully plucked and removed the produce.

The defendant pleaded that the tree stood on his own land and that the plaintiff had no right to the tree or its produce.

The Munsiff found that the tree in question was in the enjoyment of the plaintiff and his father for thirty or forty years and that the defendant, according to his own statement, obtained the tree from Government for a *malki* assessment of Rs. 2-2-0 but that it was not shown what right the Government had to give the tree to the defendant. The Munsiff passed a decree establishing the plaintiff's right to the tree, and directing the defendant to pay the plaintiff Rs. 3, on account of the tamarind produce and costs of suit.

The defendant appealed contending, *inter alia*, that the Munsiff's finding, as to possession and enjoyment, was against the weight of evidence, that there was no issue and no finding as to the ownership of the tree, and that Government ought to have been made a party to the suit.

It would appear that by some mistake that portion of the land on which the tree stood, was added to the defendant's land and the defendant, taking advantage of this, applied to the Deputy Commissioner,

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and obtained permission to pay the *malki kandayem.* The Deputy Commissioner, without proper enquiry, granted his request which has led to this litigation.

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The evidence as to the plaintiff's ownership and long possession is so clear and conclusive, that it is impossible to arrive at any other conclusion than that the plaintiff is the owner of the tree and that he has been enjoying the produce thereof for forty years and upwards. The mere fact that, at the Survey Settlement, the tree was included in the defendant's land, did not and could not confer any right on the defendant. Moreover, it is only within the last three years that the defendant has attempted to dispute the plaintiff's right and to get an indirect recognition of his own right to the land from the Revenue Authorities. The tree was planted by the plaintiff's ancestors. It continued in the plaintiff's uninterrupted possession and enjoyment for forty years and upwards. The defendant took wrongful possession of the produce only two years ago, and as neither the Government nor the defendant, who claims under the Government, had any right to the tree as against its lawful owner and possessor, the plaintiff is entitled to the relief granted to him by the Munsiff.

No. XII of the Rules framed by Government under s. 41, cl. 1 of the Land Revenue Code, is to the effect that "whenever the Deputy Commissioner considers it desirable to transfer to the occupant of the land the right to trees which are the property of Government or of individuals he shall submit his proposals in such case or class of cases for the orders of Government." In the present case we have not been referred to any such order of Government or to any rules framed by

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Government under s. 41, Land Revenue Code, which give the Government power to transfer the ownership of trees to non-occupants of the land on which the trees stand.

This appeal must, therefore, be dismissed with costs.

RAMACHENDRA IYER, *J.*—I concur in dismissing the appeal.

Appeal dismissed with costs.

July 26.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and C. Meenacshaya, Judge.

SUBANA (PLAINTIFF) *v.* NANJUNDIA (DEFENDANT).*

Razinama decree—Setting aside—Consent to irregular procedure—Civil Procedure Code (XIV of 1882), s. 244.

A *razinama* decree cannot be set aside without a fresh suit. Mere consent or application of the parties cannot confer jurisdiction upon the court to take further evidence subsequent to a decree which not having been appealed against became final. If there were any questions relating to the execution of the *razinama* decree they would have to be determined under s. 244 of the Code of Civil Procedure.

Mr. *Ananda Rao*, *S. Sirsi* for the appellant.

Mr. *Venkatramia* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

The procedure adopted by the Munsiff in setting aside the original *razinama* decree without a fresh suit is irregular, unauthorised by law and quite unprecedented. Mere consent or application of the parties did not, and could not, confer jurisdiction on the Munsiff to take further evidence subsequent to the original decree, which, not having been appealed against, became final. If there were any questions

* Appeals Nos. 273 and 274 of 1894-95, against the decree of the Munsiff of Bangalore, in O. S. No. 586 of 1891, dated the 12th day of November 1894.

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relating to the execution of the *razinama* decree, they had to be determined under s. 244 of the Code of Civil Procedure, and not by a separate suit or by proceedings which were in the nature of those necessitated by a separate suit. As the whole proceedings held by the Munsiff were *ultra vires*, the decree appealed against must be set aside. This would restore the parties to the same position in which they were on the date of the *razinama* decree, which will, of course, stand unaltered and be executed according to law. Considering the mistake made by both parties and by the Munsiff himself, we direct each party to bear his own costs throughout.

Appeal allowed without costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

August 14.

YELAPA (SINCE DECEASED) BY HIS REPRESENTATIVES 1. DURGAPA, AND 2. AN INFANT SON BOTH MINORS BY THEIR GUARDIAN AND MATERNAL UNCLE MARIYAPA (DEFENDANTS) v. MOOTE NANJIA (PLAINTIFF).*

Purchase by one person for another—Lien for unpaid purchase money—Lien for monies expended in obtaining possession—Interest.

A purchased a house in his own name but for and on account of *B*; the latter having failed to pay all the purchase-money the balance was paid by *A*, who also expended further sums in suing to recover possession of the house. *Held*, that he was entitled to a lien on the property for all the monies, both the balance of purchase-money and that expended in litigation and *further* that although there was no agreement to pay interest he was entitled to compensation as the circumstances did not show he intended to lay out money for the plaintiff's benefit without recompense. His claim for interest was therefore also allowed.

Mr. *S. Narayana Rao* for the appellant.

Mr. *J. C. S. Lawrance* for the respondent.

* Appeal No. 264 of 1894-95 against the decree of Mr. P. Singarachar, Munsiff of Bangalore, in O. S. No. 1095 of 1893-94, dated the 6th day of November 1894.

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YELAPA v. MOOTS NANJIA.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The plaintiff alleged that he had purchased the house in suit in the name of the defendant and that the latter had refused to convey it to him.

The Munsiff found that the plaintiff had not paid the whole of the purchase-money, that it was the defendant who had paid Rs. 125 out of Rs. 425 to the vendor and that he had also incurred expenses in conducting a suit against a third person for the possession of the property. He ordered the defendant to convey the property to the plaintiff upon payment by him of Rs. 172. He disallowed the defendant's claim to interest upon the amount he had spent on the plaintiff's behalf, because he found that the latter had not agreed to pay interest. Both parties have appealed from the decree, the defendant upon the ground that interest ought to have been decreed, and the plaintiff upon the ground that the money which he had been decreed to pay did not form a legal charge upon the estate and that the defendant ought to have been directed to seek remedy by a separate suit.

The money which the plaintiff has been directed to pay consists of a portion of the purchase-money which was paid by the defendant for him and money which was spent by the former to maintain a suit for the recovery of the property. In regard to the purchase-money, there can be no doubt of the defendant's right to hold the land as security. The plaintiff who did not pay the full price of the land had no right to insist upon the execution of a conveyance of the whole property. The defendant may, without impropriety, be regarded as standing in the

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position of a vendor, and it is a well-known proposition of law that vendors have a lien upon the property sold for the purchase-money. The result of the decided cases upon the point is stated as follows:—

"The clear result of all the cases, without a single exception, is that the trust of the legal estate, whether freehold, copyhold or leasehold, whether taken in the names of the purchaser and others jointly or in the name of others without the purchaser results to the man who advances the purchase-money"(1). "And there may be a resulting trust *pro tanto* in favor of one who furnishes part of the purchase-money"(2).

The trust in favor of the plaintiff being founded on the fact of payment of purchase-money, and it being found that a portion thereof had not been paid by him, the Munsiff was right in holding that the defendant had a lien upon the property for the money he had paid.

At the time of purchase, the property was in the possession of a stranger and it was necessary to bring a suit to oust him. It is admitted that the defendant paid the costs of that litigation. Whether he has a lien upon the estate for the recovery of that amount is the point for consideration. We are of opinion that natural justice requires that the plaintiff should be compelled to pay the money before he can claim possession of the land. The rule of law is thus laid down by Story:—"the civil law seems to have proceeded upon a far broader principle of natural justice. For, by that law, any *bonâ fide* possessor, as for instance a creditor who had laid out money in pre-

(1) Story, Eq. Jurisp. s. 1200. (2) Same, p. 536, note (a)

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serving, repairing or substantially improving an estate, was allowed a privilege or lien for such amelioration"(1). We think that this principle may be applied to the case before us. The defendant instituted a suit in his name at the plaintiff's request to recover property for the plaintiff's benefit. So long as the parties deemed it necessary to maintain the trust and to put the defendant forward as ostensible owner, a suit against the plaintiff for money could not have been in their contemplation. Nor could it have been in their contemplation that the plaintiff might choose his own time to claim the property so as to prevent the defendant from pursuing his remedy by an action. The defendant, like the creditor referred to by Story, laid out money for recovering and preserving the property for the plaintiff and we think that he ought to be allowed a lien upon the property. For these reasons we dismiss the plaintiff's appeal with costs.

We are of opinion that the defendant was entitled to interest. If there was no agreement to pay interest, there can be no doubt that he was entitled to compensation. The circumstances of the case do not show that the defendant intended to lay out money for the plaintiff's benefit without recompense. We allow the defendant's appeal with costs.

Plaintiff's appeal dismissed, defendant's allowed: both with costs.

(1) Story, Eq. Jurisp., s. 1239.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

1895
October 21.

KATIJABI AND ANOTHER (DEFENDANTS 2 AND 3) *v.* MOHAMED KHAN (PLAINTIFF).*

Mahomedan Law—Restitution of conjugal rights—Dower—Contract as to residence—Remand—Death of wife—Abatement.

In a suit by a Mahomedan husband for restitution of conjugal rights it was pleaded in defence that a contract had been made by the husband not to remove the wife from *B* and further that he had not paid dower agreed on. *Held* that, unless the dower was exigible, its non-payment could be no defence to the suit. *Also*, that the authorities differ as to whether an agreement regarding residence such as that set up was lawful under Mahomedan Law; and the case should be therefore remanded in order to ascertain the views of a few leading Mahomedans.

The wife having died pending the litigation, *held* that the cause of action did not survive and the suit should consequently abate.

Mr. *J. C. S. Lawrence* for the appellant.

Mr. *D. Venkataramia* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The suit was filed by a Mussalman for restitution of conjugal rights. The wife answered that the plaintiff had entered into a contract with her not to remove her from Bangalore, and that he had no right to compel her to accompany him to Madras. She also contended that he had promised to pay thirty-nine tolas of gold for dower, and that he ought to pay that amount before he claimed restitution.

The husband deposed that the dower had been fixed at Rs. 700, that he promised to pay it when and as he found it convenient to pay, and that it was true that he had executed the agreement which was filed in court by the wife. She then stated that if the

* Appeal No. 165 of 1894-95, against the decree of Mr. P. Singarachar, Munsiff of Bangalore, in O. S. No. 365 of 1894-95, dated the 30th day of October 1894.

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husband would live in Bangalore and if he paid the dower, she would agree to live with him in Bangalore.

The Munsiff at once proceeded to deliver judgment. He was of opinion that the agreement could not be pleaded in bar of the suit, and that non-payment of dower was no objection to ordering restitution. He directed the wife to return to the husband. She has appealed from the decree.

The Munsiff has stated in the judgment, that there was no dispute in regard to the facts of the case. The defendant contends that it is exigible dower, and the appeal was argued on the footing that the amount was payable on demand. If the dower was not exigible, we do not know why the Munsiff took the trouble to quote the judgments in *Abdulkadir* v. *Salima and another*(1); *Kunhi* v. *Moidin*(2) and *Hamidunnessa Bibi* v. *Zohiruddin Sheik*(3).

Again in regard to the agreement pleaded by the defendant. It would seem from Amir Ally's Treatise on Mahomedan Law, that the agreement is lawful under that law. It would seem from Macnaughten and Baillie that courts may disregard it. There being a conflict of authorities, we consider it advisable to ascertain the views of a few leading Mussalmans. We direct the Munsiff to try the following issues:—

(1). Whether the parties are governed by the law of the Sunnees or Shiahs?

(2). What is the amount of the dower, Rs. 700 or 39 tolas of gold ?

(1) I. L. R. 8 All., 149. (2) I. L. R. 11 Mad., 327.
(3) I. L. R. 17 Cal., 670.

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(3). Whether the whole was exigible or whether it was partly exigible and partly deferred? If it was partly exigible, how much can the defendant demand?

(4). Whether according to the custom of the country, the contract is lawful?

The Munsiff will submit his findings on or before the 20th December 1895.

Remanded for trial of issues.

Dec. 10.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, JJ.) was as follows:—

It has been reported to us that the plaintiff's wife is dead. The plaintiff's cause of action does not of course survive and consequently the suit abates. We direct that each party do bear his costs throughout.

Suit to abate.

Nov. 4.

Before A. Ramachendra Iyer, and C. Meenacshaya, Judges.

R. VENKATASAMI PILLAY AND TWO OTHERS (DEFENDANTS) v. KRISHNAMA (PLAINTIFF).*

Gift—Immoral consideration—Construction of document.

A deed of gift of immovable property was executed by *A* in favour of *B* who was at the time living with him as his concubine. *B* sued *A* for possession. The material portion of the deed was as follows:—"You have been living in my house. As there is no property for your maintenance in future, I give you the following movable and immovable properties as stridhana, for your maintenance after my death. * * * * * I have put you in possession of the property this day. During my life-time you are to remain in my house, and keep the said property in your possession. After my death, you will be entitled to dispose of the said property." *Held* that, on a proper construction of the document, *B* did not acquire a valid title so as to entitle her to eject *A*. *Further,* that, even assuming *B's* right to present possession admit-

* Appeal No. 225 of 1894-95, against the decree of the Munsiff of Bangalore in O. S. No. 192 of 1894-95, dated the 29th day of November 1894.

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ted of no doubt, the consideration was immoral as being for future cohabitation and the gift ought not to be upheld by a court of justice.

Messrs. *C. Krishna Murti* and *Nunjundapa* for the appellants.

Mr. *Bheema Rao* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The plaintiff sought to recover possession of a house and rested her title upon an alleged deed of gift executed by defendant No. 1. The defence was that the consideration was immoral and that the plaintiff did not acquire a good title to the property. The Munsiff decreed the claim. The defendant has appealed.

The deed was executed when the plaintiff was living with defendant No. 1 as his concubine. The material portion of the document is as follows :—" You have been living in my house. As there is no property for your maintenance, in future, I give you the following movable and immovable properties as stridhana, for your maintenance after my death. * * * * * I have put you in possession of the property this day. During my life-time you are to remain in my house, and keep the said property in your possession. After my death, you will be entitled to dispose of the said property."

It is manifest that the gift was not made in consideration of past immoral cohabitation. The woman was bound to live with him and of course entitled to be maintained by him during his life-time, and the gift was intended to take effect from the date of his death. It is true that he professed to put her in

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possession of the property at the date of the document; but it does not appear that he intended to divest himself of his title and to vest it in her. The intention of the document being to provide for her maintenance from the date of his death, and there being a clause to the effect that she should be entitled to exercise acts of ownership after his death it would seem that she had his permission to hold the property during his life, and that she did not acquire a valid title so as to entitle her to eject him.

Assuming that her right to present possession admits of no doubt, we have no hesitation in holding that the consideration was immoral, and that the gift ought not to be upheld by a court of justice.

We reverse the Munsiff's decree and direct that the suit be dismissed with costs throughout.

Appeal dismissed with costs.

Before J. W. Best, Chief Judge and Meenacshaya, Judge.

Dec. 6.

ERA (PLAINTIFF) v. MUDAYA SETTY (DEFENDANT No. 1).*

Limitation—Majority—Adverse possession.

A suit for possession of land is not barred by limitation merely because more than three years have elapsed prior to its institution since the plaintiff attained his majority. There must have been twelve years' adverse possession against the plaintiff.

Mr. *C. Krishna Murti* for the appellant.

Mr. *B. Nanjundapa* for the respondent.

The Judgment of the Chief Court (BEST, *C.J.* and MEENACSHAYA, *J.*) was as follows :—

The Munsiff has found the suit to be time-barred on the sole ground that the plaintiff attained his majo-

* Appeal No. 331 of 1894-95, against the decree of Mr. P. Singarachar, Munsiff of Bangalore, in O. S. No. 457 of 1893-94, dated the th day of March 1895.

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rity more than three years prior to the institution of the suit. As contended before us, even assuming the finding as to the plaintiff's age to be correct, the suit cannot be held to be time-barred unless there has been twelve years' adverse possession against the plaintiff.

The plaintiff's case is, that the land came into his uncle's possession only on his (the plaintiff's) father's death, which took place ten years prior to the suit, and the case of defendant No. 1 is, that his vendee, defendant No. 3 purchased the property in 1886, when it was sold in execution of the decree passed against the plaintiff's uncle who was the owner of the property.

If the facts are as stated by the plaintiff, the suit is clearly not barred. Consequently, the decision on the third issue depends on findings to be arrived at on other issues.

We must set aside the decree as against defendants Nos. 1, 2 and 3, and remand the suit for disposal on its merits.

The costs of this appeal will be costs in the suit.

Appeal allowed. Suit remanded.

Dec. 20.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

SHANBOGUE RAMAPA (DEFENDANT) v. CHENAPA (SINCE DECEASED) BY HIS LEGAL REPRESENTATIVE AND SON SHAMI, A MINOR, BY HIS GUARDIAN NANJAPA, AND THREE OTHERS (PLAINTIFFS).*

Shanbogue—Potigay—Inalienability.

The remuneration *(potigay)* payable to a Shanbogue is his exclusive perquisite in which no other member of the family has

* Appeal No. 370 of 1894-95, against the decree of Mr. B. Basavaradya, Munsiff of Maddagiri, in O. S. No. 289 of 1894-95, dated the 15th day of March 1895.

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any claim: and it makes no difference that an agreement to share it was made when the family property was divided.

Mr. *S. Narayana Rao* for the appellant.

Mr. *L. Srinivasa Iyengar* for the respondents.

The Judgment of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

The suit is for a share of a Shanbogue's *potigay*. The Munsiff has decreed the same to the plaintiffs. The defendant appeals. It is contended in his behalf that the Shanbogue's *potigay* is inalienable, and belongs exclusively to the person appointed to do the work.

As pointed out in Civil Revision Petition No. 127 of 1894-95, Rule VII of the "Rules relating to Remuneration of Patels and Shanbogues" provide that the remuneration payable to a Shanbogue shall be his exclusive perquisite in which no other member of the family shall have any claim.

For the respondent it is contended that the present case is distinguishable in that the agreement sought to be enforced is part of an arrangement made when the family property was divided. We do not think that this circumstance can be allowed to override the Rule, which has the force of law.

We allow this appeal and setting aside the decree of the court below, dismiss the suit.

In the circumstances of the case, each party will bear his own costs throughout.

Appeal dismissed without costs.

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1895 July 1.

Before A. Ramachendra Iyer and O. Meenacshaya, Judges.

JOOGOWDA (DEFENDANT) *v.* KUPAMA ALIAS LAKSHMAMA (PLAINTIFF).*

Alteration of decree—Civil Procedure Code (Act XIV of 1882) ss. 206, 210 and 305.

On an application by a judgment-debtor for postponement of sale of attached property, an order was made that time should be granted and the judgment-debtor should pay twelve per cent. interest on the decreed amount from date of the order, the decree providing for six per cent. interest only. *Held*, that the order was clearly one made under s. 305 of the Code of Civil Procedure and as s. 210 of the Code provides that no decree should be altered at the request of parties save as provided in that section (210) or s. 206, the order was *ultra vires* and could not effect an alteration of the decree.

Mr. *S. Ramaswamier* for the appellant.

Mr. *L. Srinivasaiengar* for the respondent.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The point for determination is, whether the decree-holder is entitled to claim interest at twelve per cent till date of payment. It is admitted that direction was given by the decree for payment of interest at six per cent only. The decree-holder rests the claim upon an order which was passed by the Judge on the 10th January 1883, and which is as follows:—

" Five months' time is granted under s. 305 of the Civil Procedure Code. Certificate to be given under the section to the judgment-debtor. Judgment-debtor to pay interest at twelve per cent. on the decreed amount from this date." The decree-holder's contention is that the order operated to alter the decree.

* Miscellaneous Second Appeal No. 5 of 1894-95, against the order of Mr. C. Cress, District Judge of Mysore, in Miscellaneous Appeal No. 28 of 1894-95, dated the 8th day of December 1894, confirming the order of Mr. C. B. Seshagiri Rao, Munsiff of Srirangapatam, in Miscellaneous Case No. 774 of 1893-94, dated the 19th day of October 1894.

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The judgment-debtor's application was for an order to postpone the sale of the attached property. It was evidently an application made under s. 305 of the Code. The Judge admitted it as an application under that section and passed an order accordingly. The section gives no power to a court to alter a decree under execution.

The decree-holder contends that the order must be considered to have been passed under s. 210 of the Code. We are unable to accede to it. In the first place, the order does not purport to have been passed under the section; secondly, it was not passed to enable the debtor to pay the amount decreed by instalments; and thirdly, the record does not show that the order was made on the debtor's application and with the consent of the creditor.

The last paragraph of s. 210 is as follows:—

"Save as provided in this section and s. 206, no decree shall be altered at the request of parties."

The section supports the debtor's contention that when there was an application before the court under s. 305, the court had no power to alter the decree even with the consent of the parties. An alteration of a decree except under the provisions of ss. 206 and 210 being prohibited by law, the order which was passed on the 10th January 1883 was invalid and inoperative. We reverse the orders of the lower courts in so far as they have allowed the claim to recover interest at twelve per cent., and remand the case to the Munsiff to settle accounts between the parties on the footing that interest at six per cent. only was claimable. The costs of the appeal will be paid by the respondent. Each party will bear his costs in the lower courts.

Appeal allowed with costs.

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1895 March 8.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

LINGOJI AND FOUR OTHERS (DEFENDANTS) *v.* TULAJAPA (PLAINTIFF).*

Defamation—Cause of action—Special damage—Distinction between libel and slander—Privilege—Parties.

In a suit for damages for slander alleged to have been uttered before a caste *panchayet, held* that the English law of slander as forming part of the law of defamation and as such drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage is not applicable to this country, and mere defamatory words are actionable without proof of special damage. *Also,* both parties should be allowed to adduce such evidence as they might wish to offer to prove the circumstances under which and the occasion on which the alleged defamatory language was used, and the order remanding the case for disposal on the merits was right. *Semble* there should have been separate suits against each of the defendants and not one suit against all jointly.

Mr. *D. Venkataramia* for the appellant.

Mr. *S. Narayana Rao* for the respondents.

The Orders of the Chief Court (THUMBOO CHETTY, *C. J.* and RAMACHENDRA IYER, *J.*) were as follow:—

THUMBOO CHETTY, *C. J.*—The view taken by the District Judge, that the English Law relating to slander is not applicable to India and that no proof of special damage is necessary to maintain an action for damages for slander, is supported by the decisions of the Calcutta, Madras and Allahabad High Courts. See *Parvathi* v. *Mannar*(1), *Ibin Hosein* v. *Haidar and another*(2) and *Dawan Singh* v. *Mahip Singh*(3).

*Miscellaneous Appeal No. 29 of 1894-95, against the order of Mr. B. Thirumalachar, District Judge of Nagar, in Appeal No. 62 of 1893, remanding O. S. No. 33 of 1893, on the file of the Munsiff of Honnali for further enquiry.

(1) I. L. R. 8 Mad., 175. (2) I. L. R. 12 Cal., 109.
(3) I. L. R. 10 All., 425.

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I am disposed to follow these decisions. I, therefore, agree with the District Judge in holding that the Munsiff was wrong in throwing out the suit on the ground that, as the plaintiff sustained no special damage, the words uttered by the defendants were, *per se*, not actionable. But this was not the only ground on which the suit was dismissed. The Munsiff found that the alleged oral slander was made *bonâ fide* before a caste *panchayet*. The Munsiff, however, refused to take evidence on this point. Both the plaintiff and the defendants should, I think, be allowed to adduce such evidence as they may wish to offer to prove the circumstances under which and the occasion on which the alleged defamatory language was used. If the caste *panchayet* was expressly assembled to decide the differences that subsisted between the parties and if, on that occasion, the defendants stated that they would not associate with or dine with the plaintiff, that was purely a caste question, and the plaintiff would be without remedy except in caste tribunal. *See* the observations of Mr. Justice Farran in *Raghunath Damodar* v. *Janardhan Gopal and others*(1). As the case was disposed of by the Munsiff without going into evidence, it is premature to decide this point. The suit was properly remanded for taking evidence and disposal on the merits.

This appeal must therefore be dismissed with costs.

RAMACHENDRA IYER, *J.*—This was an action for damages for defamation. The plaintiff alleged that when he and the defendants were present at a caste meeting, the latter declared in the presence of others

(1) I. L. R. 15 Bom., 610.

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that he was not fit to dine with them and to attend their caste meeting. He claimed damages for the attack which was made upon his character and for the pain of mind which was caused by the defamatory words.

The defendants pleaded that they did not slander the plaintiff, that the words were not actionable, and that the construction which was put on them by the plaintiff was not right.

The Munsiff dispensed with the examination of witnesses and dismissed the suit on two grounds. He was of opinion that the action was not maintainable, inasmuch as the plaintiff did not allege in the plaint that he had sustained special damages by reason of the slander. He thought that the defendants might have uttered the words "hastily, on the spur of the moment," aad that the action would not lie. If there was a libel, *i. e.*, if the words were put in writing and published, he said, "he should certainly have taken a different view of the case, for the writing, as an act of deliberation, would show a more malicious mind."

The District Judge on appeal reversed the Munsiff's decree, and remanded the suit for investigation on the merits. The defendants have appealed from the order of remand. The distinction between a slander and a libel has been established by the law of England. Eminent Judges have maintained that it is not grounded on reason and that no distinction ought to be made between the two classes of defamatory statements. Mansfield, *C. J.*, who delivered the judgment of the court in *Thorley* v. *Lord Kerry* made the following observations upon the points in question :—"I cannot, upon principle, make any

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difference between words written and words spoken, as to the right which arises on them of bringing an action. It has been truly argued that in the old books and abridgements no distinction is taken between words written and spoken. * * * In the arguments both of the judges and counsel, in almost all the cases, the question has been, whether what is contained in writing is the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question whether it tends to produce a breach of the peace; but that is wholly irrelevant and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damages sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London may be much more extensively diffused than a few printed papers dispersed or a private letter; it is true that a newspaper may be very generally read, but that is all accidental. These are the arguments which prevail upon my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, and we cannot, in opposition to them, venture to lay down at this day," &c. *See* Biglow's Leading Cases on Torts, pp. 97—98.

The reasoning has commended itself to the judg-

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ment of the High Courts in British India; and they, adopting the definition of defamation contained in the Penal Code, have refused to make a distinction between oral and written slander. *Parvathi* v. *Mannar*(1) and *Dawan Singh* v. *Mahip Singh*(2). The difference has not been established by a series of decisions in this Province, and there seems no reason for refusing to follow the High Courts.

In regard to the necessity for alleging special damages as the ground of action, there has been a consensus of opinion among the High Courts that the English law rests on a narrow foundation and that the institution of caste and the social features of the country require that defamatory words which are calculated to insult a man and to cause pain to his mind should be held actionable without proof of special damages. *Ibin Hosein* v. *Haidar and another*(3) and *Trailokya Nath Ghose* v. *Chendra Nath Dutt alias Singh*(4). The words being *primâ facie* actionable, there should be an investigation as to the circumstances in which they were uttered. The two grounds on which the Munsiff rested his judgment being shown to be wrong, I agree in upholding the order of remand and dismissing the appeal.

There is one observation which I wish to make for the consideration of the plaintiff and the Munsiff. If the defendants defamed the plaintiff, each one rendered himself liable for the words spoken by him, and the plaintiff has a separate cause of action against each. The allegations contained in the plaint are not sufficiently explicit to my mind to warrant the institution of a single suit against all defendants.

Appeal dismissed with costs.

(1) I. L. R. 8 Mad., 175. (2) I. L. R. 10 All., 425.
(3) I. L. R., 12 Cal., 109. (4) I. L. R. 12 Cal., 424.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

1895 March 11.

VENKATA RAO (PLAINTIFF) *v.* MALLIA AND ANOTHER (DEFENDANTS).*

Land Revenue Code (Mysore)—Suit for enhancement of rent—Jurisdiction of Assistant Commissioner—Appeal—Limitation Act (XV of 1877) s. 5.

A suit was filed by a *jodidar* for enhancement of rent before the Deputy Commissioner who transferred it for disposal to the Assistant Commissioner and subsequently entertaining an appeal from the decision of the latter confirmed the decree. The *jodidar* then appealed to the Government which returned his petition to him with the remark that the Chief Court was the tribunal which had power to entertain it. He thereupon made a second appeal to the Chief Court and prayed that the delay in presenting the same might be excused under the provisions of s. 5 of the Limitation Act. *Held* by the Chief Court that s. 5 of the Limitation Act applied and that the delay should be excused. *Also* that, although it was not stated in the plaint that the suit was filed under s. 86 of the Land Revenue Code, yet the statement of claim and the relief sought made it clear that it was a suit under that section. *Further* that, as the Assistant Commissioner who passed the decree was not in charge of the Revenue administration of the taluk in which the land was situated, he had no jurisdiction to try the suit and his decree should be quashed and the suit remitted to the Deputy Commissioner for decision under *s.* 88 of the Revenue Code. *Semble* that, if the Assistant Commissioner had jurisdiction to try the case, his decree would be the decree of a Deputy Commissioner, appealable direct to the Chief Court under *s.* 96 of the Revenue Code and not intermediately to the Deputy Commissioner.

Mr. *S. Ramaswamier* for the appellant.

Mr. *B. V. Ramaswami Chetty* for the respondents.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The Assistant Commissioner who dismissed the suit, declined to record a finding upon the alleged right of the plaintiff to enhance the rent, as he was

*Miscellaneous Appeal No. 20 of 1894-95, against the decree of the Deputy Commissioner, Bangalore District, in Revision Appeal No. 5 of 1893-94, dated the 17th day of June 1895.

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of opinion that the suit was not one filed under s. 86 of the Mysore Land Revenue Code. Whether he ought not to have made an adjudication under the above section is a question which we have to determine after perusing the plaint. Before we proceed to discuss the question, it seems necessary to discuss two preliminary objections in regard to the jurisdiction of the lower courts.

Section 88 of the Code enacts that any person entitled to have rent enhanced upon any ground specified in s. 86 "may bring a suit before the Deputy Commissioner." It is enacted by s. 96 that "an appeal shall lie to the Chief Court from all decisions passed by a Deputy Commissioner under s. 88." It would seem from these sections that a Deputy Commissioner was expected to act as a court of first instance and that the Chief Court was empowered to entertain a regular appeal upon facts. Section 8 empowers an Assistant Commissioner who is placed in charge of the Revenue Administration of a Taluk to perform, so far as regards the Taluk, "such of the duties and exercise such of the powers imposed and conferred upon the Deputy Commissioner by this Regulation." If the Assistant Commissioner entertained the suit in exercise of the power conferred upon him by this section, we must be satisfied that he was by order of the Government placed in charge of the Revenue Administration of the Taluk of Hoskote. If he had jurisdiction to entertain the suit, the decree which was passed by him was a decree made by a Deputy Commissioner, and it would seem that the Deputy Commissioner of the District has no power to entertain an appeal from the decree. As

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we ought not to presume that either the Assistant Commissioner or the Deputy Commissioner acted without jurisdiction in this case, we shall request the Deputy Commissioner to state the facts and to quote the rule or order of Government which conferred original jurisdiction upon his Assistant and appellate jurisdiction upon himself. The hearing of the appeal is adjourned to the 18th instant.

June 17.

The final Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

This is a suit for enhancement of rent filed under s. 86 of the Mysore Land Revenue Code. It was dismissed by the General Assistant Commissioner of Bangalore in September 1893. An appeal was made to the Deputy Commissioner, who by his decree dated the 20th February 1894 confirmed the decree of the court of first instance. The plaintiff made a second appeal to the Government, which was returned to him in October 1894 with the remark that the Chief Court was the tribunal which had power to entertain it. He has made a second appeal from the Deputy Commissioner's decree and prays that the delay may be excused under the provisions of s. 5 of the Limitation Act.

We have no doubt that the appellant honestly believed that the Government had power to entertain his appeal under s. 210 of the Revenue Code. He made a *bonâ fide* mistake, and when it was pointed out to him, he presented the appeal in the Chief Court without loss of time. We must excuse the delay and admit the appeal, if we can hold that the provisions of the general Limitation Act apply to

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and govern proceedings under the Revenue Code which is a special Regulation. The question has been fully discussed and all former decisions bearing upon it reviewed by a full Bench of the Madras High Court in *Veeramma* v. *Abbiah*(1). Justice Muthusami Iyer expressed his opinion in that case(2) as follows:—

"When the Act to be modified is of a very special kind, complete in itself, and it does not admit of the several provisions of the Limitation Act being imported into it without incongruity and without defeating the intention of the Legislature, it is not controlled by the general provisions of the Limitation Act * * * . The question must resolve itself ultimately into one of intention of the Legislature, either express or implied."

This being the test we shall proceed to determine whether the Land Revenue Code is complete in itself or whether it has left it to us to import into it the provisions of the Limitation Act.

Appeals from decisions passed by Deputy Commissioners under ss. 88, 92 and 93 of the Code lie to the Chief Court and appeals from decisions or orders passed in other cases are governed by the Rules contained in ch. XIII of the Code. This chapter provides a special period of appeal; directs that the time required to prepare a copy of the decision appealed from shall be excluded in computing the period; and empowers the appellate authority to admit an appeal not presented within time if the delay be satisfactorily accounted for. It prescribes a form for making an appeal; defines the powers of the appellate authority

(1) I. L. R. 18 Mad., 99. (2) At pp. 104 and 105.

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and enables that authority to suspend the execution of an order pending decision of an appeal therefrom. The Code has made no provision in regard to appeals which lie to the Chief Court under s. 96 except that such appeals shall be presented within ninety days. The absence of any provision in regard to this class of appeals is significant. The elaboration of rules to govern appeals which are made under chapter XIII and the absence of rules to govern appeals made under s. 96 show that the Legislature intended that the Code should be complete in itself so far as it affects the procedure of the Revenue Courts, and that appeals which are directed to be laid before the Chief Court should be governed by the Code of Civil Procedure and by the Limitation Act. We are of opinion that s. 5 of the Limitation Act is applicable to the case and we have power to excuse the delay and admit the appeal.

This was a suit filed by a *jodidar* for enhancement of rent. Although he did not state in the plaint that he filed it under s. 86 of the Land Revenue Code, yet the statement of claim and the relief sought by him make it clear that it was a suit under that section. The plaint was presented in the office of the Deputy Commissioner who transferred it for disposal to an Assistant Commissioner. The decree was passed by an Assistant Commissioner and was confirmed on appeal by the Deputy Commissioner. The point we have to determine is whether the Assistant Commissioner had jurisdiction to try the suit. Section 88 of the Code enacts that " any person entitled to have rent enhanced or abated upon any of the grounds specified in ss. 83, 86 and 87 may bring a suit before the

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Deputy Commissioner within whose district the land on account of which such rent is payable is situated and such Deputy Commissioner shall decide the suit after holding a formal enquiry;" and s. 96 enacts that "an appeal shall lie to the Chief Court from all decisions passed by a Deputy Commissioner under ss. 88, 92 and 93." It is manifest that suits filed under s. 88 should be tried by Deputy Commissioners themselves, and that if any party wishes to appeal from a decision, the Chief Court is the appellate authority. If an appeal is filed in the Chief Court it must be a regular appeal both on questions of law and facts and not simply a second appeal in which form the present case has come before us. Section 8 of the Code provides that an Assistant Commissioner who is placed by the Government in charge of the Revenue Administration of one or more of the taluks in a district shall, "so far as regards the taluk or taluks in his charge, perform such of the duties and exercise such of the powers imposed and conferred upon the Deputy Commissioner by this Regulation, or by any other law at the time being in force as the Government may, by a general or special order, from time to time direct," &c. If the Assistant Commissioner who tried the suit was empowered to act under this section his decree would be a decree made by a Deputy Commissioner and an appeal therefrom might be made to the Chief Court under s. 96. If this was the case, we might quash the decree passed by the Deputy Commissioner as a Court of Appeal and direct the appellant to make a regular appeal to the Chief Court from the Assistant Commissioner's decree. The Deputy Commissioner has informed us that the

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Assistant Commissioner who passed the decree was not placed in charge of the taluk in which the land is situated. It follows that he had no jurisdiction to try the suit. We quash the decree passed by him and the decree passed on appeal by the Deputy Commissioner and remit the suit to the Court of the Deputy Commissioner for investigation and decision under s. 88 of the Code. We direct each party to bear his costs of the appeal.

Appeal allowed without costs.

June 17.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and A. Ramachendra Iyer, Judge.

NANJUNDA SASTRY (DEFENDANT) v. ASWATHA NARAINA SASTRY (PLAINTIFF).*

Execution—Order for abatement—Limitation—Limitation Act (XV of 1877), s. 14 and Arts. 178 and 179.

Seven parcels of land were attached and claims made in respect of two only of them but the court made order in respect of the remaining five, "to abate, pending disposal of the claim." The claims having been disposed of, another application for execution was made within three years of such disposal but beyond three years from the date of the abatement order. *Held* that, if s. 14 of the Limitation Act be taken as applicable to proceedings in execution, the period occupied in disposing of the claims might be excluded and the latter application for execution would therefore be within the three years prescribed by Art. 179 of the Limitation Act. *Further*, that, apart from the applicability of s. 14 of the Limitation Act, the action of the court in suspending further proceedings by the abatement order, though not contemplated by any of the provisions of the Civil Procedure Code relating to execution, continued attachment of all the property pending disposal of the claims and had the effect of keeping the decree alive till the date of such disposal, from which the decree-holder had a fresh starting point of limitation.

* Miscellaneous Appeal No. 37 of 1894-95, against the order of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, in Execution Case No. 458 of 1894-95.

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Per RAMACHENDRA IYER, *J.*—The property was under attachment and there was no order to cancel the attachment or deny the right of the decree-holder to execute his decree. There was no occasion for a second application, as the first was still subsisting and what was needed was that some steps should be taken in continuance of it. * * * In substance, the application was one under Art. 178 and was within time as it was filed within three years from the date when the right to apply accrued, *i. e.*, when order on the claims was passed.

Mr. *S. Narayana Row* for the appellant.

Mr. *Nanjundapa* for the respondent.

The Orders of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) were as follow :—

THUMBOO CHETTY, *C.J.*—The decree obtained by the plaintiff, Aswatha Naraina Sastry, is dated the 15th February 1890. On an application for execution filed on the 9th June 1891, seven properties were attached; there were claims in respect of two of them and, pending enquiry into the same, the execution proceedings were stayed. This order was passed by the Munsiff on the 21st August 1891, and is in these terms :—

" To abate, pending disposal of the claim."

Why the sale of the five properties, regarding which no claims were preferred, was not ordered forthwith, does not appear from the proceedings.

Of the two claim cases, one was disallowed and the other allowed by an order dated the 21st March 1892.

On the 20th June 1892, one Doda Byrana filed a regular suit in respect of the other properties under attachment, which was disposed of on the 23rd July 1894.

The present application for execution was filed on the 1st October 1894, and the judgment-debtor contended that it was barred by limitation not having

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been filed within three years from the 21st August 1891.

The Munsiff of Chickballapur held that, as the present application was filed within three years from 21st March 1892, the date of disposal of the claim preferred to the attached property, it was within time.

The judgment-debtor (defendant No. 2) has now appealed against the Munsiff's order.

It seems to me that the order "to abate" passed on the 21st August 1891 was not an order contemplated by any of the provisions of the Code of Civil Procedure relating to execution. It had not the effect of putting an end to the plaintiff's application for execution. The attachment of the properties continued, and the passing of an order for sale in furtherance of the plaintiff's application was simply postponed or stayed, pending disposal of the claim preferred against the attachment of two out of seven properties sought to be sold. The court of its own motion refused to pass orders for the sale of any of the properties till the claim aforesaid was enquired into and disposed of. The application of the 21st August 1891 must, therefore, be regarded as having been pending till the 21st March 1892, when the claim was disallowed. Till then, the plaintiff was not in a position to move the court to do anything in the face of the order of the 21st August 1891. If s. 14 of the Limitation Act applies to proceedings in execution of a decree, as was held in *Hira Lal* v. *Badri Das*(1), followed by the Bombay High Court in *Navalchand Memchand* v. *Anu Chand Talakchand*(2),

(1) I. L. R. 2 All., 792 and L. R. 7 I. A., 67.
(2) I. L. R. 18 Bom., 734.

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the period occupied in the disposal of the claims between 21st August 1891 and 21st March 1892 may be excluded, and the present application held to have been filed within the period of three years prescribed by Art. 179.

Apart, however, from the question of the applicability of s. 14, it seems to me that the first application of the plaintiff was pending on the 21st March 1892 and the plaintiff was precluded by the order of the 21st August 1891 from applying for the sale of any of the properties till 21st March 1892, and as the present application was filed within three years computed from that date, it was not barred.

The action of the court in suspending further proceedings by its order of the 21st August 1891, and the continuance of the attachment of all the properties, pending disposal of the claim, had the effect of keeping the decree alive till the 21st March 1892 and gave the plaintiff a fresh starting point of limitation from that date. In this view, I am disposed to uphold the Munsiff's order and to dismiss this appeal with costs.

RAMACHENDRA IYER, *J.*—The decree-holder made an application for execution in June 1891. It was granted and seven parcels of land were attached. Claims were made in regard to two of them. Thereupon the Munsiff made an order "To abate, pending disposal of the claim." This was improper, as the Munsiff had no power to order that proceedings in execution shall abate, simply because there was a claim regarding two out of seven parcels under attachment. There was no apparent reason for preventing the decree-holder from bringing to sale the

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five parcels regarding which no claim had been made. If there was any special reason for selling the whole property at one and same time, it ought to have been stated in the order. The legality of the order, however, is not the point for consideration in this case but its legal effect. Whether the Munsiff was right or wrong in passing the order, I think it cannot be disputed that it operated to suspend proceedings until the claims were investigated and orders were passed in March 1892. The question is, whether the date of the orders on the claims furnishes a fresh starting point for computing limitation. This depends upon whether the application which was made in October 1894 is to be deemed an application for execution within the meaning of Art. 179 of the Limitation Act or an application made under Art. 178. If it is an application for execution, we have to consider when the last application was made to execute or to take some steps in execution of the decree. If it is an application made under the other clause, the point is when the right to make the application accrued to the decree-holder.

It has been held by a Full Bench of the Calcutta High Court that the expression "applying to enforce the decree," which is equivalent to applying for execution of the decree, "means the application by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings." *Chunder Coomar Roy* v. *Bhogobertty Prosonno Roy*(1). This decision has been followed by the Madras High Court in *Prabhucara Row* v. *Pottannah*(2) It has also been held that although an application may be in form like an application for execution, yet it

(1) I. L. R. 3 Cal., 242. (2) I. L. R. 2 Mad., 1.

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is the duty of the court to consider the substance and judge whether it is an application for execution as described in the Code of Civil Procedure or whether it is simply an application to continue the proceedings already commenced. *Issurree Dassee* v. *Abdool Khalak*(1). There is also the judgment in *Hurronath Bhunjo* v. *Chunni Lall Ghose*(2) in which Justice Markby expressed the following opinion :— "I quite admit that the mere striking off the case from the file is not conclusive upon this question ; and it is now settled by numerous cases that we must look to all the circumstances of the case and consider whether the execution proceedings were really brought to an end. This question is in a great measure, if not entirely, a question of fact."

Was it the intention of the decree-holder to make an application under s. 235 of the Code of Civil Procedure, or to continue the proceedings which were commenced in 1891 ? The property was under attachment, and there was no order to cancel the attachment or to deny the right of the decree-holder to execute his decree. There was then no occasion for a second application, inasmuch as the first application was still subsisting and what was needed was that some step should be taken in continuance of it. What the decree-holder had to do was to apply to the Munsiff to sell the property, *i.e.*, to take another step in furtherance of execution and during the pendency of execution proceedings. In substance, the application was one made under Art. 178, and it was within time as it was filed within three years from the date when the right to apply accrued, *i.e.*, when order was passed upon the claims under s. 278 of the Civil Procedure Code. I agree in dismissing the appeal.

Appeal dismissed.

(1) I. L. R. 4 Cal., 415. (2) I. L. R. 4 Cal., 877.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges. 1895 June 17.

Miscellaneous Appeal No. 43 of 1894-95.

SANTHARAJA SETTY (DEFENDANT No. 1) *v.* PUTA SETTY (PLAINTIFF).*

Miscellaneous Appeal No. 44 of 1894-95.

SANTHARAJA SETTY (DEFENDANT No. 1) *v.* DEVARAJAYA (DEFENDANT No. 5).*

Miscellaneous Appeal No. 45 of 1894-95.

SANTHARAJA SETTY (DEFENDANT No. 1) *v.* DODADEVA SETTY (DEFENDANT No. 6).*

Suit for division of family property—Razinama—Decree in favour of defendant not party to razinama—Separate execution for respective shares—Decree-holder—Civil Procedure Code (Act XIV of 1882) s. 2—Powers of court in suit for partition.

A decree was passed for division of family property on a *razinama* filed by the parties, whereby one-fourth share was given to the plaintiff and to each of three defendants. Separate applications were made for execution and from the orders on these appeal was made, the contentions being that one of the defendants not being a party to the *razinama* the decree in his favour was bad in law and that separate execution should not have been granted for possession of the respective shares decreed to each party. *Held* (1) that whether the decree was or was not in accordance with the *razinama* was a question that ought to have been raised by appeal from the decree itself and was not a point arising in execution; (2) that the decree having awarded to each party a fourth share of the property, each is a decree-holder as defined by s. 2 of the Civil Procedure Code and each entitled to execute the decree. *Also* was, it is quite competent to a court in a suit for partition to make an award in favour of each co-parcener: and if a defendant desires to have his share ascertained and separated, the court is not bound to refer him to a separate suit.

Messrs. *S. Ramaswamier* and *Ragavachar* for the appellant.

Mr. *Krishnamurti* for the respondents.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The plaintiff filed a suit for division of family pro-

*Miscellaneous Appeals Nos. 43, 44 and 45 of 1894-95, against the decree of Mr. C. Cress, District Judge of Mysore, in Execution Case No. 13 of 1894-95, dated the 11th day of January 1895.

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perty. A decree was passed in accordance with a *razinama* filed by the parties, whereby a fourth share of the property was given to the plaintiff and to each of defendants Nos. 1, 5 and 6. Separate applications for execution were made by the plaintiff and defendants Nos, 5 and 6. The court below has granted them and directed an account to be taken. Defendant No. 1 has appealed from the orders.

He contends that defendant No. 6 was not a party to the *razinama* and that the decree which was made in his favor was bad in law. Whether the decree was or was not in accordance with the *razinama* is a question which ought to be raised by way of appeal from the decree itself. It is not a point which arises in execution. A decree has been passed in favor of defendant No. 6 and so long as it stands unreversed it must be executed at the instance of the decree-holder.

Another contention is that defendants Nos. 5 and 6 have no right to execute the decree for possession of their respective shares. The decree having awarded to each of them a fourth share of the property, each is a decree-holder as defined by s. 2 of the Code of Civil Procedure, and each is entitled to execute the decree. It is competent to a court in a suit for division to make an award in favour of each co-parcener. " A decree for partition in not like a decree for money or for the delivery of specific property which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of the persons interested in the property of which partition is sought, and having been so made it is unnecessary for those persons who are defendants in the suit to come for-

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ward and institute a new suit to have the same rights declared." *Sheik Khoorshed Hossein* v. *Nubbee Fatima*(1). See also the decree in *Krishnasami Ayyangar* v. *Rajagopal Ayyangar*(2) which was confirmed by the High Court. This being the nature of a suit for division it has been ruled by us that the subject-matter of a partition suit among Hindus is the whole property and not a share claimed by a plaintiff and that the suit must be tried by a court which has jurisdiction over the whole property. We have not overlooked the fact that a plaintiff in such a suit pays institution-fee in respect of his share only. It is a question for determination whether a defendant's demand for award of a separate share to him ought to be treated as a cross-claim and valued accordingly. We have abstained from discussing the question in this appeal for, assuming that the defendants have not paid institution-fee, we do not perceive how the court which has to execute the decree can invalidate it upon this ground. It is not to be supposed that in a suit for division the court is bound to separate the defendants when they are willing to live as members of an undivided family. We simply wish to state that if a defendant desires to have his share ascertained and separated, the court is not bound to refer him to a separate suit. The orders which have been passed by the District Judge not being open to the objections which have been urged by the appellant we dismiss the appeals with costs.

Appeals dismissed with costs.

(1) I. L. R. 3 Cal., 552. (2) I. L. R. 18 Mad., 75.

1895 July 1.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and C. Meenacshaya, Judge.

BALE APANA SETTY ALIAS CHANA BASAPA SETTY (DEFENDANT) *v.* SALAR MOHADEEN (PLAINTIFF).*

Failure of parties to produce evidence on date of hearing—Disposal of suit—Adjournment—Civil Procedure Code (Act XIV of 1882), ss. 157, 158—Court-fee.

On the date fixed for hearing of a suit, both parties were represented by pleaders but neither had their witnesses in attendance and an application by the plaintiff for adjournment was not opposed by the defendant. The Subordinate Judge thereupon dismissed the suit remarking that the plaintiff had failed to prove the issues and substantiate his claim. On appeal the District Court treated the order as one under s. 157 of the Civil Procedure Code and remanded the case for decision on its merits after taking the evidence offered by the parties. *Held* by the Chief Court that the order of the Subordinate Judge was not one under s. 157 but under s. 158 of the Civil Procedure Code and under the circumstances the plaintiff was entitled to consideration. The ends of justice were met by the order of remand passed by the District Judge which was therefore confirmed with costs against the plaintiff. *Also*, the appeal to the District Court was wrongly treated as a miscellaneous appeal; and as it was rightly brought on the full court-fee, the difference of stamp-duty refunded by order of the District Court must be recovered from the plaintiff.

Mr. *Ragavachar* for the appellant.

Mr. *Nanjundapa* for the respondent.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and MEENACSHAYA, *J.*) was as follows :—

In this case issues were framed and a date was fixed for final disposal. There were subsequently some adjournments as the parties were not ready to examine their witnesses. At last, the 2nd November 1893 was fixed for final disposal and parties were ordered to produce their witnesses. On that date,

*Miscellaneous Appeal No. 31 of 1894-95, against the order of the District Judge of Mysore, in Appeal No. 56 of 1894-95, cancelling the order of the Sub-Judge of Mysore, in Miscellaneous Case No. 489 of 1894 and Original Suit No. 17 of 1893.

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the advocates on both sides were present. The plaintiff sent a telegram to say that his mother was ill and that he could not, therefore, attend. An adjournment was prayed for but was refused, on the ground that although the plaintiff was unable to appear he ought to have taken out summonses for his witnesses or caused their attendance. The defendant's advocate also represented to the court that his witnesses too were not in attendance. The Sub-Judge, thereupon, dismissed the suit, remarking that the plaintiff had failed to prove the issues and to substantiate the claim.

The District Judge, on appeal, treating the Sub-Judge's order as one passed under s. 157 of the Code of Civil Procedure, remanded the case for decision on the merits after taking the evidence offered by the parties. He saddled the plaintiff with the defendant's costs.

It is against this order of remand that appeal has been preferred.

The District Judge was wrong in supposing that the Sub-Judge disposed of the case under s. 157 of the Code of Civil Procedure. The proper section applicable to the case is s. 158, for both parties were directed to produce their witnesses and failed to do the act for which time was granted. Treating, however, the order passed by the Sub-Judge as one falling under s. 158, we are of opinion that, as both parties were unprepared to go on with the case and the defendant's advocate did not oppose the application made by the plaintiff's advocate for adjournment, the plaintiff was entitled to some consideration. The nature of the case was such that before witnesses could be examined, the partnership accounts and the parties themselves had

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to be examined with regard to the pleadings on which the issues were framed. We think, therefore, that the ends of justice would be met by upholding the order of remand passed by the District Judge and on the terms laid down, *viz.*, that the defendant's costs incurred in the lower courts up to this stage should be paid by the plaintiff. We dismiss this appeal, but without costs.

The appeal to the District Judge was properly engrossed on a full stamp. The District Judge was wrong in treating it as a Miscellaneous appeal. The difference of stamp-duty refunded must be recovered again from the plaintiff.

Appeal dismissed without costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

July 5.

GAJARAJA MUDALIAR (PETITIONER) *v.* KUTIAMAL ALIAS UNAMALAYAMAL (COUNTER-PETITIONER).*

Government Insurance Policy—Self-acquired or joint property—Right of widow.

Held that, money due on a Government Policy of Life Insurance is placed absolutely at the disposal of the insured party who can nominate any person by will or other document to receive it: and a certificate of heirship in respect of such money was rightly granted to the widow of the insured.

Quære, whether property of the kind ought to be regarded as joint family property or the self-acquired property of the deceased which in the absence of sons or grandsons his widow is entitled to inherit.

A Government servant, insured under the Government scheme of Life Insurance, having died, his father applied for a certificate to enable him to receive the amounts due on the deceased's policies. The application was opposed by the widow of deceased, who herself claimed a certificate of heirship.

The Order of the District Court was as follows:—

The premia was paid for the policies *A* and *B* from the salary of the deceased. The amount secured by the policies *A* and *B* is the self-acquisition of the

* Miscellaneous Appeal No. 42 of 1894-95, against the order of Mr. Narahari Rao, District Judge of Nandidroog, in Miscellaneous Nos. 167 and 279 of 1894-95, dated the 25th day of January 1895.

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deceased. The counter-petitioner, the widow of the deceased, is entitled to the self-acquired property of the deceased. She, but not the father of the deceased, is entitled to receive the amount of the policies *A* and *B*.

On the counter-petitioner Kutiamal, giving security, a certificate will be granted to her, authorising her as the widow of the deceased to collect the amount of the policies.

The father of the deceased appealed to the Chief Court from this Order. Mr. *J. Evers* appeared for the appellant. Mr. *Lubeck* for the respondent, the widow.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

We have not been convinced that the District Judge made an error in granting a certificate of heirship to the widow of Perumal Mudaliar. The debt which is due to the estate of the accused is money payable by the Government of Mysore under two contracts of insurance dated respectively 1st September 1892 and 4th October 1893. The contract placed the money absolutely at the disposal of the insured party and it enabled him to nominate any person by will or other document as the person entitled to receive the endowment bonus. It is an arguable point whether property of this kind ought to be regarded as joint family property or as the self-acquired property of the deceased which, in the absence of sons or grandsons, his widow is entitled to inherit. As we see no reason to dissent from the District Judge's finding, we dismiss the appeal and direct each party to bear his or her costs of the appeal.

Appeal dismissed with costs.

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1895 July 19.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C. I. E., Chief Judge and C. Meenacshaya, Judge.

KAVATI RANGAPA (ASSIGNEE AND PLAINTIFF) *v.* CHENA BASAPA (SURETY AND DEFENDANT.)*

Civil Procedure Code (Act XIV of 1882) s. 336—Time allowed for application to be declared insolvent—Mutchalika.

Although a *mutchalika* specifies thirty days as the time within which a judgment-debtor is to file his application to be declared insolvent, his surety is not liable if the application is filed within a month, that being the time allowed by law.

Mr. *S. Narayana Rao* for the appellant.

Mr. *L. Sreenivnsa Iyengar* for the respondent.

The Order of the Chief Court (THUMBOO CHETTY, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

Section 336 of the Code of Civil Procedure allows a month to the debtor to file an application to be declared an insolvent. In the *mutchalika*, thirty days was specified, but as the law allows a month and the application for insolvency was filed within that time, the surety was not liable. We dismiss this appeal.

Appeal dismissed.

July 29.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C.I.E., Chief Judge and C. Meenacshaya, Judge.

SUBAMA (PLAINTIFF) *v.* SUBIA (DEFENDANT No. 3).†

Maintenance—Deserted wife—Wife's earnings—Reduction of maintenance.

Where a deserted wife having obtained a decree against her husband for maintenance is subsequently granted a Government scholarship. *Held* that, such a result of her own exertions does not entitle her husband to have any reduction made in the amount of maintenance he was decreed to pay. The proceeds of the

* Miscellaneous Appeal No. 60 of 1894-95, against the order of Mr. P. Singarachar, Munsiff of Bangalore, in O. S. No. 942 of 1892.

† Miscellaneous Appeal No. 47 of 1894-95, against the order of Mr. H. V. Nunjundiah, M.A., M.L. Sub-Judge of Bangalore, in Miscellaneous No. 141 of 1894-95, dated the 10th day of December 1894.

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scholarship are the wife's personal earnings and are not in any way claimable by the husband. The position of a deserted wife is very different from that of a Hindu widow; and the principle on which maintenance is allotted to the latter is no guide for the case of the former. The circumstances under which modification of maintenance may be made has reference to a change in the circumstances of the husband and not those of the wife.

Mr. *B. Nanjundapa* for the appellant.

Mr. *Ramaswamy Chetty* for the respondent.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and MEENACSHAYA *J.*) was as follows :—

The appellant obtained a decree for maintenance against her husband, the respondent, in 1888, in the Sub-Judge's court, and on appeal this decree was confirmed by the Chief Court, which fixed the allowance at Rs. 6 per mensem. In the early part of last year, through her praiseworthy exertions, she obtained a scholarship of Rs. 15 a month in the Maharanee Girls' School at Mysore, and the respondent in September 1894, submitted an application to the Sub-Judge, praying that the decree might be suspended, so long as she was in receipt of this scholarship.

The Sub-Judge granted his prayer, and the wife now appeals to this court.

The Sub-Judge entered into an elaborate discussion of the question whether this income could be viewed as her *stridanam*, over which she could be considered as having an absolute control, or property under the control and disposal of her husband, and arrived at the decision that it was property of the latter kind. If his view be correct, the husband could not only claim the suspension of the decree, he could also claim the payment to him of that portion of the scholarship, which was in excess of the allow-

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ance. If he had the right to appropriate the scholarship towards the maintenance he was ordered to pay, he had also the right to appropriate the excess to his own use.

We are unable to uphold the Sub-Judge's order. Some distinction ought to be recognised between the principle upon which maintenance is awarded to a Hindu widow, and that which should be the guide in awarding maintenance to a deserted wife: considering that a widow is bound to a life of strict asceticism and self-denial, what is considered needful for mere necessaries of life and indispensable acts of religion and charity, is the criterion for fixing the amount, but in the case of a deserted wife, forsaken for no fault of hers, it is unreasonable to deny her some comforts of life. She is not bound down to a life of asceticism. She is a *soomangali*, and can wear jewels and other indicia of non-widowhood.

According to Yajanavalkya, a wife forsaken without fault, may compel her husband to pay her a third part of his wealth, or if poor, to provide maintenance for her. It may fairly be presumed, from this alternative provision, that a third part of the deserting husband's estate is directed to be given in lieu of maintenance, as a sort of punishment for the offending husband for marital injustice and oppression. The Sub-Judge has apparently misunderstood that part of the judgment of the Chief Court which stated "that the maintenance now awarded is subject to be modified hereafter according to circumstances at the discretion of the court." We are clearly of opinion that that limitation cannot apply to the present circumstances of the case. That had reference only to a change

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in the circumstances of the husband. In the absence of any authority to support the husband's contention, we refuse to countenance the doctrine that the honest earnings of a discarded wife, who had obtained a decree for separate maintenance, and who is not proved to lead an unchaste life, are liable to be set off against the amount the husband has been condemned to pay for breach of marital obligations. Such a doctrine would be opposed to public policy, and cripple the honest endeavours of a woman in the appellant's predicament, to improve her position and status by honest means.

It should also be borne in mind that the needs of the appellant must have greatly augmented in consequence of her new position. To attend to her new functions she must dress respectably, purchase books and undergo other incidental expenses (besides maintenance), to meet which the amount of the scholarship may hardly suffice. We cannot enter into too minute an enquiry as to the sufficiency or otherwise of the scholarship.

We allow this appeal with costs throughout, and reject the respondent's memorandum of objections.

Appeal allowed with costs.

August 16.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C.I.E., Chief Judge and A. Ramachendra Iyer, Judge.

THE COMMERCIAL AND LAND MORTGAGE BANK, LIMITED, (PLAINTIFFS) v. C. SABAPATHI IYA (DEFENDANT).*

Transfer of Property Act (IV of 1882) ss. 88 and 90—Civil Procedure Code (Act XIV of 1882) ss. 2 and 242—Decree—Order in execution—Mortgage—Personal execution.

The decree in a mortgage suit having been transferred for exe-

*Miscellaneous Appeal No. 14 of 1893-94, against the order of Mr. T. Narahari Rao, District Judge, Nandidroog Division, in Execution Case No. 83 of 1893, dated the 31st day of August 1893.

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cution, application was made for arrest of the defendant and it was objected that the decree was only for sale of the mortgaged property within the meaning of s. 88 of the Transfer of Property Act; that the defendant was not personally liable; and to make him so the plaintiff should obtain a decree under s. 90 of the same Act. The court that passed the decree had previously made an order directing execution against the person of the defendant which order was followed by another to the same effect by the Registrar of that court. *Held,* that the order of the Court and Registrar having the force of a decree under s. 2 of the Civil Procedure Code should be regarded as a decree within the meaning of s. 90 of the Transfer of Property Act, and *Further* under s. 242 of the Civil Procedure Code the legality of that order could not be questioned by a court executing the decree.

Messrs. *J. C. S. Lawrance* and *T. S. A. D'Cruze* for the appellant.

Messrs. *S. Ramaswamier* and *James Short* for the respondent.

The Orders of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) were as follow:—

THUMBOO CHETTY, *C.J.*—The Commercial and Land Mortgage Bank of Madras obtained a decree against Mr. C. Sabapathi Iya, in the Madras High Court. The decree was transmitted to the District Court of Nandidroog for execution.

The plaintiff Bank applied for a warrant for the arrest and imprisonment of the defendant, who contended that, under the decree he was not personally liable for the decreed amount which was made recoverable only by the sale of certain movable and immovable property specified in the decree.

The District Judge considered the defendant's objection was good and valid and refused to execute the decree against the defendant's person. Against this order, the plaintiff Bank has now appealed.

The Bank instituted three suits (one in Ootacamund

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and two in the Madras High Court) against the defendant which were settled by one *razinama*. It was intimated during the hearing of this appeal that the properties mortgaged had been sold and the proceeds credited first, according to the terms of the *razinama*, towards the amount of decree in the Ootacamund suit leaving the decrees in the two Madras suits unsatisfied.

In January 1891, the plaintiff Bank applied for a warrant of arrest in the present suit, and after notice to the defendant, an *exparte* order was passed by Mr. Justice Handley on the 28th April 1891, directing execution against the person of the defendant. In pursuance of this order, another order was issued by the Registrar of the High Court on the 27th July 1891 which runs as follows :—

"Upon reading the Judge's order dated the 28th April 1891 and the petition filed herein by Messrs. Barclay, Morgan and Orr, attorneys for the plaintiffs, on the 5th day of January 1891, and the tabular form therein contained verified by Mr. E. F. Stranack, the Secretary and Treasurer of the Commercial and Land Mortgage Bank (Limited), it is ordered that the decree herein be executed by issuing out of and under the seal of this Honourable Court a warrant directed against the person of C. Sabapathi Iya, the the defendant herein."

It was contended, on behalf of the defendant, that the decree was merely a decree for the sale of the mortgaged property within the meaning of s. 88 of the Transfer of Property Act and that the defendant was not personally liable for the decreed amount or any portion thereof. It was further argued that if

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the mortgaged properties had been sold and the proceeds were insufficient to pay up the amount of the decrees, the plaintiff Bank ought to have obtained a decree under s. 90 of the Transfer of Property Act, if it could be shown that the amount due under the decree now sought to be executed was legally recoverable from the defendant.

The order of Mr. Justice Handley, reiterated in the order of the Registrar quoted above, is an order which has the force of a decree within the definition of "decree" in s. 2 of the Code of Civil Procedure and, as such, may be regarded as a decree within the meaning of s. 90 of the Transfer of Property Act. The legality of that order cannot be questioned by a court executing the decree. Section 242 of the Code of Civil Procedure clearly lays down that "any order of the court by which the decree was passed, or of such court of appeal as aforesaid in relation to the execution of such decree, shall be binding upon the court to which the decree was sent for execution." This section is a bar to our deciding whether under the decree the defendant was personally liable or not. That question was determined by the court which passed the decree, and also on appeal. All the decided cases quoted by the defendant's advocate support the plaintiff's right to execute the decree against the defendant's person rather than the defendant's contention. Whatever may have been the intention of the parties in drawing up the *razinama*, the decree passed thereon adjudged the defendant to pay the amount found due, and also contained a declaration of the plaintiff's lien or charge upon the mortgaged property. The decree did not say, in express terms, that, for any balance not

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recovered by sale of the mortgaged property, the defendant was not personally liable. Nor was the decree drawn up in exact conformity with the forms given Nos. 128 and 129 of the schedule IV appended to the Code of Civil Procedure. If the defendant was dissatisfied with the decree in the particular form in which it was drawn up he should have applied to the court which passed the decree to amend it, by inserting words which would have precluded the decree-holder from proceeding against him personally. See *Krishto Kishore Dutt* v. *Rooplall Doss*(1).

The case of *Sonatun Shaw* v. *Ali Newaz Khan*(2) is inapplicable because, here, as already observed, an order was obtained by the plaintiff Bank, having the force of a decree within the meaning of s. 90 of the Transfer of Property Act, though, as held by the Allahabad High Court in *Batak Nath* v. *Petamber Doss*(3), it was not necessary for the decree-holder to obtain a separate decree under s. 90, Transfer of Property Act, as the decree passed on the *razinama* adjudged the defendant to pay the amount of the decree independently of the sale of the mortgaged property. For the same reasons it is unnecessary to consider the recent Calcutta case, *Lalla Tirhini Sahai* v. *Lallahurruk Narain*(4). If, in this case, there was merely a decree for the sale of the hypothecated property, then, it may be argued that it was not a decree for payment of money. See *Ramcharan Bhagat* v. *Sheobarat Rai*(5). But the defendant was directed to pay the amount due as in a money decree.

(1) I. L. R. 8 Cal., 689. (2) I. L. R. 16 Cal., 423.
(3) I. L. R. 13 All., 360. (4) I. L. R. 21 Cal., 28.
(5) I. L. R. 16 All., 418.

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"Where there is, in a mortgage, nothing to the contrary, the mortgage contains, within itself so to speak, a personal liability to repay the amount advanced." See *Musaheb Zaman Khan* v. *Inayat-ul-lak*(1). This quotation applies with equal force to the present decree, which does not, in express terms, exonerate the defendant from personal liability.

The cases of *In the matter of Sumat Doss*(2) and *Haji Musa Haji Ahmed* v. *Purmanand Nursey*(3) are distingushable from the present case, as they relate to questions of limitation, want of jurisdiction and fraud, &c., which do not arise in the present case.

The case of *Sheik Budan* v. *Ramachendra Bhunjgaya*(4) is also not in point, because, the defendant had notice of the plaintiff's application for execution against him before the order of the 28th April 1891 was passed, and if he did not take any steps to get that order, declaring his personal liability, set aside in appeal, he was himself to blame. It may here be remarked that in a similar case between the same parties there was an appeal in which the court of appeal construed the decree (which is identical with the one now in question) as entitling the plaintiff Bank to execute the decree by arrest and imprisonment of the defendant (*vide* Judgment or order of the Madras High Court, in Appeal No. 12 of 1894).

For the foregoing reasons the defendant's contention is untenable. The order of the District Judge appealed against must be reversed and the lower court directed to execute the decree as prayed for by

(1) I. L. R. 14 All., 519. (2) 13 B. L. R., App. 27.
(3) I. L. R. 15 Bom., 216. (4) I. L. R. 11 Bom., 537.

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the plaintiff Bank. The costs incurred by the plaintiff in this and in the lower court must be paid by the defendant.

RAMACHENDRA IYER, *J.*—The High Court of Madras sent a decree for execution to the District Judge of Bangalore. The decree-holder applied for a warrant to arrest the judgment-debtor. The District Judge was of opinion that the decree-holder had no right to apply for execution against the debtor's person, and rejected the application. The decree-holder has appealed from the order.

Section 224 of the Code of Civil Procedure enacts that a court which sends a decree for execution to another court shall send "a copy of any order for the execution of the decree, and, if no such order has been made, a certificate to that effect;" and s. 242 of the Code enacts that "any order of the court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the court to which the decree was sent for execution."

Among the papers which were transmitted by the High Court of Madras to the District Judge, there is a copy of an order dated the 27th July 1891, which directed "that the decree herein be executed by issuing out of and under the seal of this Honourable Court a warrant directed against the person of the defendant herein."

I am of opinion that the order of the High Court was binding upon the District Judge who had to execute the decree. If the order was erroneous, or if, as the defendant states, it was passed behind his back, the District Judge ought to have stayed exe-

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cution of the decree under s. 239 of the Code so as to enable the defendant to apply to the High Court of Madras for any other order relating to the execution. I agree in reversing the order of the District Judge.

Appeal allowed with costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Sept. 16.

SUBARAYA (DEFENDANT) v. JAYANA (PLAINTIFF).*

Unstamped Promissory note—Right of suit—Consideration—Admission.

In a suit upon an unstamped promissory note, the defendant admitted the claim but pleaded discharge and denied liability to pay interest.

Held, that it was not necessary to put the document in evidence as its genuineness and the consideration were admitted and the claim for interest was based not upon the document itself but upon an independent oral contract.

Mr. *Narasimiengar* for the appellant.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

This was a suit upon an unstamped promissory note. The defendant admitted the claim but pleaded discharge and denied his liability to pay interest. At a subsequent stage of the suit, he pleaded that the plaintiff ought not to be allowed to bring an action upon a document which was inadmissible in evidence. The Munsiff agreed in this view and dismissed the suit. The District Judge reversed the decree and remanded the suit. He was of opinion that it was not necessary to put the document in evidence inasmuch as its genuineness and the consideration therefor were admitted by the defendant and that

*Miscellaneous Appeal No. 13 of 1895-96, against the order of Mr. M. Ramaswamier, Officiating District Judge of Mysore, in Appeal No. 147 of 1894-95, dated the 16th day of July 1895.

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the demand for interest was based not upon the document itself but upon an independent oral contract.

The defendant has appealed from the order of remand and invites our attention to the case of *Damodar Jagannath* v. *Atmaram Babaji*(1). The judgment shows that that suit was upon a promissory note for Rs. 28 lent to the defendant. The defendant denied payment as alleged by the plaintiff and pleaded that the consideration was not Rs. 38 but Rs. 37 which was the price of grain delivered to him. Justice Birdwood held that the plaintiff could not prove consideration otherwise than by proving the promissory note and that as the document was not duly stamped, the suit must fail. Justice Jardine appears to have taken the same view, for the two Calcutta cases which he quoted in support of his opinion were cases in which it was necessary to put the promissory notes in evidence. We are of opinion that the order of remand was right and we reject the appeal.

Appeal rejected.

Before A. Ramachendra Iyer, and C. Meenacshaya, Judges.

GOPA SETTY, DECREE-HOLDER (PLAINTIFF) v. SRI SUBRAMANYA SACHIDANANDA BARATISWAMI, GURU OF SIVAGANGE MUTT, JUDGMENT-DEBTOR (DEFENDANT).* October 30.

Execution—Attachment of monies in hands of public officer.

Where monies belonging to a judgment-debtor or which might be applied towards satisfaction of decrees against him had come to the hands of the Deputy Commissioner of *B* and the Amildar of *N*, an application for execution by attachment of such monies

* Miscellaneous Appeal No. 50 of 1894-95, against the order of Mr. H. V. Nanjundia, Subordinate Judge of Bangalore, in Execution Case No. 2801 of 1893-94, dated the 18th day of January 1895.

(1) I. L. R. 12 Bom., 443.

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should not be rejected summarily, or without enquiry as to whether the estate of the judgment-debtor was or was not capable of attachment.

Mr. *L. Srinivasaiengar* for the appellant.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

We are of opinion that the Judge ought not to have rejected the application for execution. Money which belonged to the judgment-debtor or which might be applied towards the satisfaction of decrees passed against him, appears to have got into the possession of the Deputy Commissioner of Bangalore and the Amildar of Nelamangala. We are not aware of the circumstances under which the estate of the judgment-debtor was transferred to the Deputy Commissioner. If the Government has assumed management of the estate, we are sure that some provision will be made for the discharge of just debts. As we are not aware of all the circumstances, we are not in a position to find whether the estate is, or is not, capable of attachment. We direct the Judge to restore the application to his file. We make no order as to costs.

Appeal allowed.

October 30.

Before A. Ramachendra Iyer and O. Meenacshaya, Judges.

KEMBADURIA (PLAINTIFF) *v.* SAMBIA (DEFENDANT).*

Civil Procedure Code (Act XIV of 1882) ss. 98, 99 and 157—Non-appearance of parties—Dismissal of suit—Appeal.

After settlement of issues, on the date fixed for final hearing, the parties failed to appear and the court dismissed the suit. *Held* that the order was one made under s. 157 of the Civil Procedure Code and therefore appealable as a decree to the Chief

*Miscellaneous Appeal No. 11 of 1895-96, against the decree of Mr. T. Narahari Rao, District Judge of Nundidroog Division, in Miscellaneous Case No. 874 of 1894-95, dated the 27th day of June 1895.

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Court. Sections 98 and 99 of the Code were not applicable, as issues had been framed and the suit proceeded to final hearing. *Also*, although it was perhaps an irregularity that the appeal was admitted as a Miscellaneous and not a Regular Appeal, that did not affect the powers of the court or its competency to reverse the order appealed against.

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The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

Issues were settled and a day was fixed for final hearing. The parties failed to appear on that day. The Judge dismissed the suit. The order of dismissal was or ought to have been made under s. 157 of the Code of Civil Procedure. An order passed under this section was a decree and was appealable to the Chief Court. It is wrong to contend that the court had no power to reverse the order. It was perhaps an irregularity that the court admitted a Miscellaneous Appeal from the order, and did not insist upon a regular appeal being made, from a decree. We entertain no doubt that an order passed under s. 157 is appealable, and that we have power to reverse it. Sections 98 and 99 do not apply inasmuch as issues had been framed and the suit had proceeded to the stage of final hearing. We dismiss the application for review.

Review rejected.

Before J. W. Best, Chief Judge and A. Ramachendra Iyer, Judge. Dec. 11.

ANNI SETTY (PETITIONER) *v.* NAGAMA (COUNTER-PETITIONER).*

Hindu will—Collection of Debts on Succession (Act XXVII of 1860).

On application by the executor of a Hindu's will for a certificate under Act XXVII of 1860 the District Judge declined to enquire into the genuineness of the will on the ground that the

* Miscellaneous Appeal No. 24 of 1895-96, against the order of Mr. T. Narahari Rao, District Judge of Nundidroog Division, in Miscellaneous Cases Nos. 62, 89 and 90 of 1895-96.

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Hindu Wills Act was not in force in the Mysore Province. *Held* that the reason was clearly bad, as if valid it would be equally good in case of a suit being brought to establish the will.

On consideration of the circumstances of the case it was further *held* that the executor should have the certificate applied for.

Mr. *S. Narayana Rao* for the appellant.

Mr. *Narasimiengar* for the respondents.

The Order of the Chief Court (BEST, *C. J.* and RAMACHENDRA IYER, *J.*) was as follows :—

The reason assigned by the Judge for declining to enquire into the genuineness of the will relied on by the appellant is that the Hindu Wills Act is not in force in this Province. If this objection were valid, it would be equally good in case of a suit being brought to establish the will. The reason is clearly bad.

Section 3 of Act XXVII of 1860 requires that there should be some enquiry as to the right to the certificate, and the Judge should have considered the evidence which had been recorded.

It is stated that the appellant is in possession of the bonds under which are due the debts for recovery of which the certificate is required. It is further alleged that suits have been brought on some of the bonds, the defendants in those suits being relatives of the respondent. Moreover, it appears that a suit brought by the respondent against the appellant, for recovery of her deceased husband's property from the appellant, is pending. Further the will is registered.

In these circumstances we think the certificate should be given to appellant on his giving security for the amount sought to be recovered, Rs. 700.

We order accordingly in supersession of the order of the lower court. There will be no order as to costs.

Appeal allowed. No costs.

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Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge. 1895. August 9.

KEMPE GOWDA, (DEFENDANT) v. KADAY GOWDA (PLAINTIFF).*

Rules for remuneration of Patels and Shanbogues—Patel—Gumasta—Potigay—Remuneration of acting incumbent—Private agreement with substantive office-holder—Agreement against public policy—Contract Act (IX of 1872) s. 23.

A Patel being incapacitated by age and infirmity from performing his duties efficiently a *Gumasta* was on his application appoined, without any special conditions. The Patel had made a private agreement with the *Gumasta* that the latter should take only two-thirds of the *potigay* or official remuneration, the remaining one-third to be paid to the Patel. *Held* that as the "Rules relating to the Remuneration of Patels and Shanbogues" provide that the entire remuneration shall be paid to the officiating incumbent of an office for his support and that the same is his exclusive perquisite on which no other member of the family or co-sharer shall have any claim, an agreement such as that in question was contrary to public policy and incapable of enforcement and void under s. 23 of the Contract Act.

Mr. *D. Venkataramia* for the petitioner.

Mr. *S. Naraina Rao* for the counter-petitioner.

The Judgment of the Chief Court (THUMBOO CHETTY, *C. J.* and RAMACHENDRA IYER, *J.*) was as follows:—

The plaintiff is the registered Patel of Chamanhully, Mandya Taluk. As he was incapacitated by old age and infirmity for performing the duties of his office efficiently, the defendant was (on plaintiff's own application) appointed as *Gumasta.*

Under the Rules relating to the Remuneration of Patels and Shanbogues, the *potigay* or cash emoluments are intended for the support of the person actually officiating or performing the duties of the office (Rule 18).

*Civil Petition No. 127 of 1894-95, against the decree of the Munsiff of Srirangapatam, in S. C. No. 1544 of 1893-94.

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The officiator, who, in this case, is the *Gumasta* appointed by Government (or the Deputy Commissioner representing the Government, and with whom rests the appointment of a competent person for the performance of the duties of the office) receives his entire remuneration from the Government Treasury, and he cannot be called upon to pay any portion of such remuneration to another, as the remuneration is his exclusive perquisite, on which no other member of the family or co-sharer has any claim. The plaintiff having voluntarily and unconditionally consented to the appointment of the defendant as *Gumasta*, and the Government having also appointed him unconditionally without imposing any liability on him to maintain the registered *Hakdar* (the plaintiff) the law will not enforce any private agreement between the plaintiff and the defendant, the very object of which is to render the Rules quoted above nugatory, and to impair and impede the efficient and proper performance of the official duties devolving on the defendant. The agreement, under which the defendant was required to pay the plaintiff one-third of the defendant's official emoluments, is of such a nature that, if permitted, it would defeat the provisions of the Rules passed by Government for the payment of the *entire* remuneration to the officiator for his support. It is, therefore, opposed to s. 23 of the Contract Act.

We are aware that, in some cases, the Government have directed the officiator to pay a portion of the emolument for the support of a female *Hakdar* or of a male minor registered holder of the office. But these are special cases in which the Government,

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taking into consideration the amount of remuneration and other circumstances, made the appointment of a *Gumasta* or officiator, conditional upon the payment of such maintenance. But as already stated no such liability was imposed on the defendant when he was appointed *Gumasta*.

The plaint agreement for the partition of the official emoluments between the plaintiff and the defendant is contrary to the provisions of s. 23 of the Contract Act, and is also opposed to public policy. It cannot, therefore, be enforced.

In this view, the decree of the Munsiff must be set aside, and the plaintiff's suit dismissed. As the defendant was a consenting party to this illegal agreement and he has, by his own conduct, caused this litigation, we direct each party to bear his own costs.

Appeal allowed. No costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

August 26.

THE SRINIVASA BANK, LIMITED, DECREE-HOLDER (PETITIONER) v. APPU RAO AND TWO OTHERS (COUNTER-PETITIONERS).*

Civil Procedure Code (Act XIV of 1882) ss. 311 and 313—Decree-holder—Purchaser—Setting-aside execution sale—Costs.

At a sale of immovable property in execution of a decree held by the *S Bank*, the purchaser was the holder of another decree against the same judgment-debtor and entitled to rateable distribution. He subsequently made application to have the sale set aside on the grounds (1) that the judgment-debtor possessed no interest in the property and (2) that he had been imposed on by the misrepresentations of the Agent of the *S Bank*. *Held* that the application must be regarded as made under either s. 311 or s. 313 of the Civil Procedure Code. If under s. 313, the applicant being considered as purchaser only, it must be dismissed because it was

* Civil Petition No. 220 of 1894-95, against the order of the Subordinate Judge of Mysore, in Miscellaneous Case No. 735 of 1893-94.

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found as a fact that the judgment-debtor had a substantial interest in the property sold. If under s. 311, the applicant being considered as decree-holder, it could not be said that he had sustained substantial injury by a larger sum having been obtained for the property by reason of any assumed irregularity in publishing the sale, than might otherwise have been obtained; and as the section enacts that a sale shall not be set aside at the instance of a decree-holder if he has not sustained substantial injury, the application must also be dismissed under that section.

Mr. *L. Srinivasaiengar* for the petitioner.

Mr. *S. Ramaswamier* for counter-petitioners Nos. 1 and 2.

Mr. *S. Narasimiengar* for counter-petitioner No. 3.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

A decree which had been passed in favour of the Srinivasa Bank against Nagesa Rao was executed by sale of his right, title and interest in certain immovable property. One Appu Rao who also had obtained a decree against the said debtor and who had a right to rateable distribution under s. 295 of the Civil Procedure Code purchased the property at auction. The debtor's brother applied to have the sale set aside on the ground that the property belonged to him, and that the debtor possessed no interest in it. The purchaser also made an application on the same ground and on the ground of his having been imposed upon by the representations made by the Agent of the Bank before the sale. The Sub-Judge dismissed both applications and confirmed the sale. The District Judge concurred in dismissing the debtor's brother's application. He differed from the Sub-Judge with regard to the purchaser's application and granted it, since he was of opinion that the Agent of the Bank had made reckless statements both in regard to the quantity of the interest of the debtor and the amount of rent. He held that one who was entitled

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to rateable distribution under s. 295 was a decree-holder within the purview of s. 34 of the Code of Civil Procedure. The legality of the order is the point which is involved in the application made to us by the decree-holder.

The purchaser did not state the section of the Code under which he made application to the Sub-Judge to set aside the sale. It has been contended that, as purchaser, he had a right to apply under s. 313 and that, as decree-holder, he applied under s. 311. If it is an application under s. 313 it must be dismissed, since it has been found that the judgment-debtor had a substantial interest in the property sold. If it be regarded as an application under the other section (311) he has no reason to complain in his capacity of decree-holder; for, granting that there was material irregularity in publishing the sale, there was no reason for contending that substantial injury was done to the decree-holder by obtaining a larger sum of money than might otherwise have been obtained. The circumstances of the case make it obvious that if he was not a purchaser, he would not have dreamt of making an application under s. 311. As the section enacts that a sale shall not be set aside at the instance of a decree-holder if he has not sustained substantial injury, we must set aside the District Judge's order and dismiss the petition.

With a view to punish the Agent whose evidence shows that he made reckless statements when he applied for proclamation of sale, we direct each party to bear his costs throughout. If the Agent has made any affidavit regarding the rent payable to and the exclusive ownership of the debtor, the purchaser may apply for sanction to prosecute him.

Application allowed. Order set aside. No costs.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

KASIM ALI KHAN (PLAINTIFF) *v.* MUNIAKA ALIAS SULTAN BEE (DEFENDANT).*

Exparte decree—Application to set aside—Limitation—Limitation Act (Act XV of 1877) s. 14 and Sch. II, Art. 164—Process for enforcing decree.

An *exparte* decree was transferred for execution to a court other than that which had passed it. Notice to show cause against execution was issued and posted on the defendant's house-door in the absence of the defendant. Warrant of arrest was then issued, which was returned unserved. On a second warrant the defendant was arrested and filed an application to the court issuing the warrant to have the *exparte* decree set aside. This was within thirty days of the arrest of the defendant, but more than that time from the affixing of the notice on the defendant's door. The defendant subsequently made a similar application to have the decree set aside to the court which passed the decree: this application was made more than thirty days after the arrest. *Held*, that although the notice might be sufficient as a process to keep the decree alive, it was not a "process for enforcing judgment" which means "actual process by attachment in execution of the judgment-debtor's person or property." The limitation of thirty days prescribed by Art. 164 of Sch. II of the Limitation Act should be calculated from the date of actual arrest, the first warrant having been abortive. *Also*, the application to set aside the decree should have been made to the court that passed it, and although such application was ten days over time, the defendant was protected by s. 14 para. 3 of the Limitation Act as the mistake was *bonâ fide* in presenting the application to a court which had no jurisdiction and another application to the proper court was made on discovering the error.

Mr. *Nanjundapa* for the petitioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The Munsiff of Kolar passed a judgment *exparte* against the defendant in Suit No. 545 of 1893 and transferred the decree for execution to the Munsiff of Kolar Gold Fields. The court issued a notice to

* Civil Petition No. 225 of 1894-95, against the order of Mr. T. J. Vanderlowen, Munsiff of Kolar, in Miscellaneous Case No. 111 of 1894-95, dated the 18th day of March 1895.

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the defendant on the 24th August 1894 to show cause on the 31st idem why the decree should not be executed. The notice was affixed on the door of the defendant's house, as she had left eight days before for another village. The Judge issued a warrant of arrest which was made returnable by the 21st September. This was returned unserved with an endorsement to the effect that, in the defendant's village there was no woman bearing the name which was mentioned in the document. The Judge issued another warrant on the 4th October which was to be executed on or before the 19th October. The defendant was arrested on the last mentioned date and produced before the Judge on the same day. She stated that the plaintiff was a stranger to her, that she was not the woman against whom he had a cause of action, and that if her name was mentioned in the decree, it was an error. The Judge stayed the execution of the decree to enable her to get it set aside. She filed an application in his court on the 10th November and made a similar application on the 28th November before the Munsiff of Kolar who had passed the decree. The last application has been granted and the decree has been set aside. The plaintiff seeks to have the order set aside and the defendant's petition dismissed. He contends that the application ought to have been made within thirty days from the date on which a copy of notice was affixed on the defendant's house; and that assuming that the period of thirty days is to be computed from the day on which she was arrested, an application ought to have been filed in the court of the Munsiff of Kolar on or before the 19th November.

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Article 164 of the Limitation Act, Sch. II, which governs the case, requires a defendant to make an application within thirty days "from the date of executing any process for enforcing the judgment." The clause "executing any process for enforcing judgment" has been declared to mean "actual process by attachment in execution of the judgment-debtor's person or property." *Nil Money Singh Deo* v. *Chenderkant Benerjee*(1). A notice issued to a debtor to show cause why a decree should not be executed may be sufficient to keep a decree alive. It does not fulfil the requirements of Art. 164, which makes execution of process for enforcing a decree the starting point for computing the period of thirty days. The notice which was first issued by the Munsiff of Kolar Gold Fields was not a process for enforcing a decree. The warrant which was next issued was a process which was not executed. The second warrant was executed on the 19th October, and the period of thirty days ought to be computed from that date.

The application to set aside the decree ought to have been made to the Munsiff of Kolar, and we find that it was made on the 28th November, *i. e.*, ten days after the period prescribed therefor. The record shows that on the 10th November she made an application to the Judge to whom the decree had been transferred for execution. She made another application before the proper court when she discovered her error. She appears to have made a *bonâ fide* mistake when she presented an application on the 10th November in a court which had no jurisdic-

(1) I. L. R. 2 Cal., 124.

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tion to entertain it. She is protected by the third paragraph of s. 14 of the Limitation Act. If we deduct the period during which the application was pending in the Court of the Kolar Gold Fields Munsiff, there can be no doubt that the application which was made on the 28th November was within thirty days. We dismiss the plaintiff's application.

Application dismissed.

Before J. W. Best, Chief Judge and Meenacshaya, Judge.

VENKATA SUBIA (PLAINTIFF) v. GURUSANTIA (DEFENDANT).* Nov. 8.

Civil Procedure Code (Act XIV of 1882) s. 335—Obstruction to possession—Insolvency.

A decree-holder on a mortgage, having proved in the insolvency of his debtor, an order was passed on the insolvency proceedings that "upon application to be made on that behalf the property may be sold and out of the sale-proceeds the mortgagee will first be paid." The property was then sold under the decree and on the purchaser (decree-holder) seeking possession he was obstructed by the assignee from a brother of the insolvent, who had also been a party to the suit in which the decree had been passed. *Held*, that the order in the insolvency proceedings was quite sufficient to validate the sale; and more especially as the obstructor was neither the insolvent nor the assignee of any interest of the insolvent nor a scheduled creditor, but a mortgagee who derived his interest from a brother of the insolvent—which brother was also a party to the suit; and as further, the assignment was found to have been made without consideration, for the express purpose of defeating the decree and while the property was under attachment for the decree debt.

Mr. *D. Venkataramia* for the petitioner.

Mr. *L. Srinivasaiengar* for the counter-petitioner.

The Order of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

This is an application under s. 622 of the Code of Civil Procedure, for revision of the order of the Mun-

* Civil Petition No. 78 of 1895-96, against the order of the Munsiff of Nanjangud in Miscellaneous Case No. 420 of 1894-95.

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siff of Nanjangud, dismissing the petitioner's application made under s. 335 of the Code, for removal of the obstruction by the counter-petitioner to the petitioner's getting possession of property purchased by him in execution of the decree in O. S. No. 700 of 1887.

The petitioner was also the plaintiff in the suit in which was passed the decree in execution of which the property was sold. The defendants in that suit were three brothers, Kupusami Iya, Gundapa and Krishnapa. The decree was passed on the 13th October 1887 and awarded to the petitioner Rs. 121-12-0, with costs "recoverable from defendant No. 1 and the hypothecated properties."

In the following year, defendant No. 1 in the above suit, Kupusami Iya, applied to be declared an insolvent, and was so declared on the 30th May 1888. Petitioner was counter-petitioner No. 3 in the insolvency case and having proved his claim under the decree mentioned above, was entered as a scheduled creditor for the amount of the decree.

The Munsiff has held that, in these circumstances, the petitioner was not at liberty to execute his decree and quotes in support of his decision the judgment of Straight, J. in *Gauri Dutt* v. *Shankar Lal*(1).

The Munsiff appears to have overlooked the order of the 27th June 1888, passed in the insolvency proceedings itself which directs that "Upon application to be made in that behalf, the property may be sold, and out of the sale-proceeds the mortgagee will first be paid."

This order is quite sufficient to validate the sale.

(1) I. L. R. 14 All., 358.

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The case of *Gauri Dutt* v. *Shankar Lal*(1) is further distinguishable from the present, in that the question was raised *prior to* the execution proceedings by the insolvent judgment-debtor himself, whereas the counter-petitioner before us is neither the insolvent nor the assignee of any interest of the insolvent nor a scheduled creditor, but a mortgagee who derived his interest from a brother of the insolvent—which brother also was a party to the suit; and further, the assignment is found to have been made without consideration, for the express purpose of defeating the petitioner's decree and while the property was under attachment for the decree debt.

Setting aside the Munsiff's order, we direct that the petitioner be placed in possession of the property, the counter-petitioner's obstruction being removed.

The counter-petitioner will pay the petitioner's costs in this court and in the court below.

Application allowed with costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Dec. 2.

BASAVIA (PLAINTIFF) *v.* V. ANAPA AND ANOTHER (DEFENDANTS).*

Indian Companies Act (X of 1866), s. 4—Unregistered Company—Mutual Loan Society—Meaning of Company, Association, Partnership—Onus—Question of fact.

The "Agent" of a Mutual Loan Society or "Cheety Company" sued on a bond, and the defendant replied that it had been given by him for money borrowed from a Society which consisted of more than twenty members and was not registered under the Indian Companies Act, 1866, s. 4 and the bond therefore could not be sued upon. *Held,* that a contract *inter se* is essential to constitute a Company, Association or Partnership under the Act. It appeared from the evidence that the "Cheety Company" consisted

*Civil Petition No. 134 of 1894-95, against the decree of Mr. M. Ramaswamier, Sub-Judge of Mysore, in S. C. No. 1754 of 1893-94, dated the 1st day of December 1894.

(1) I. L. R. 14 All., 358.

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of twenty-eight members who had to pay Rs. 2 each once a fortnight. The amount so collected was sold to and purchased by a member and he executed a bond for the difference between the sum paid to him and the sums he had paid by way of subscription. There was no evidence as to the constitution of the Society or its Rules. It was not proved that the members had held any meeting or formed a Company or entered into any contract among themselves in regard to the grant of loans or collection of debts. It was also found as a fact that "the Agent of the Company was bound to settle the claims of its members." There was absolutely no evidence to prove that the Society carried on business for gain. It did not appear that there was any source of income for which the Society as a body or any individual member thereof could have made a gain.

Held further, that the defendant must satisfy the court that the Company was "a Company, Association or Partnership" within the purview of s. 4 of the Indian Companies Act, and that on the facts above stated he had failed to do so.

Also, that the question whether an unregistered Association is illegal is a question of fact which ought to be determined upon a consideration of the evidence as to the objects of the Association, its constitution and rules.

Mr. *S. Ramaswamier* for the petitioner.

Mr. *C. Krishna Murti* for the counter-petitioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

This was a suit filed in a Court of Small Causes for money due upon a bond executed by the defendant. He answered that he and twenty-eight others formed a Mutual Loan Society, that the bond was executed by him for money borrowed from the Society, and that the suit was not maintainable inasmuch as the Society, which consisted of more than twenty members, was not registered under the Indian Companies Act. The Sub-Judge of Mysore dismissed the suit chiefly on the ground that "the Company or Corporation was incapable of suing or being sued."

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The plaintiff has made an application under s. 622 of the Code of Civil Procedure for Revision of the decree.

The question turns on s. 4 of the Indian Companies Act 1866, which was the law in force when the suit was tried. The section is as follows:—"No Company, Association, or Partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the Company, Association or Partnership, or by the individual members thereof, unless it is registered as a Company under this Act &c." The defendant who contends that the Society of which he was a member was prohibited by law must satisfy us that it was "a Company, Association or Partnership" within the purview of the section.

What is the meaning of the clause a "Company, Association or Partnership consisting of more than than twenty persons?" The question does not seem to have arisen in any of the Indian High Courts. The clause has been discussed or explained by the Court of Appeal in *Smith* v. *Anderson*(1). The Lords of Justices who decided the case were unanimous in opinion and the correctness of the decision does not seem to have been doubted in any subsequent case. We have compared s. 4 of our Act with the corresponding section of the English Statute, and there being no difference between the two sections, we are of opinion that the English decision may be adopted by us. Lord Justice Brett has explained the words as follows:—"In order to come within

(1) L. R. 15 Cha. Div., 247.

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this clause, there must be a joint relation of more than twenty persons for a common purpose, which common purpose, as it seems to me, must be the performing jointly a succession of acts. Moreover, they must be so related together as to form a Company, a Partnership or an Association. I confess I have some difficulty in seeing how there could be an Association for the purpose of carrying on a business which would be neither a Company nor a Partnership * * *. But according to all ordinary rules of construction, if the Association mentioned in s. 4 is not, strictly speaking, a Company or a Partnership, it must be something of a similar kind. It must be a relation established between twenty persons or more." Lord Justice Cotton said that if "Association" is intended to denote something different from a "Company" or "Partnership, it must be judged by its two companions between which it stands, and it must denote something where the associates are in the nature of partners. Lord Justice James observed "an ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A Company or Association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in, &c."

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It being clear from the judgment that a contract *inter se* is essential to constitute a Company or Association or Partnership, we shall proceed to consider whether the existence of this element has been established by the defendant. His evidence was as follows:—" There were twenty-eight members who had to pay Rs. 2 each once a fortnight. The amount so collected was sold to, and purchased by a member, and he executed a bond for the difference between the sum paid to him and the sums he had paid by way of subscription." Other witnesses also deposed to this effect. There was no evidence as to the constitution of the Company and the rules by which it was governed. It was not proved that the twenty-nine members had held a meeting and decided to form a Company and had entered into a contract among themselves in regard to the grant of loans or collection of debts.

Regarding the liability of the Agent of the Cheety Company, the Judge found that " Venkojee as *the Agent of the Company was bound to settle the claims of its members.*" If the Company as a body was not bound to arrange for the settlement of claims of the members, and if it was the duty of the so-called Agent to find ways and means to satisfy those claims, it is clear that the Sub-Judge made a mistake in deducing therefrom the legal incidents of a contract of Agency. The Agent was not a mere office-holder, or a person like a Director of a Company who has no personal interests in contracts entered into by the Company. The finding of the Judge means that the Agent was in fact the guiding spirit, that the members looked to him and not to the other mem-

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bers for payment of the moneys due to them, and that they were connected through him and not by reason of a contract made among themselves. For these reasons we hold that the defendant has failed to prove that the Company ought to have been registered.

There was absolutely no evidence to prove that the Society carried on business for gain. We have already referred to the defendant's evidence. It does not appear that there was any source of income from which the Society as a body or any individual member thereof could have made a gain.

We may here observe for the guidance of the Sub-Judge in similar cases, that the question whether an unregistered Association is illegal, is a question of fact which ought to be determined upon a consideration of the evidence as to the objects of the Association, its constitution and the rules made for its government.

The defendants' advocate has invited our attention to *Jennings* v. *Hammond*(1). We have studied it and also *Shaw* v. *Benson*(2), and *Dawson* v. *Fox* (3), which followed the judgment in *Jennings* v. *Hammond*(1). In that case, the learned Judges found, upon a consideration of the rules and regulations of the Society, that certain persons exceeding twenty in number had agreed to become members of the Society, and had, for their mutual benefit, raised by subscription a sum of money and had agreed to raise further sums of money with the intention of afterwards lending it to members of the Society under the rules thereof, that the Company was an illegal Association,

(1) L. R. 9 Q. B. Div., 225. (2) L. R. 11 Q. B. Div., 563.
(3) L. R. 14 Q. B. Div., 379.

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that the plaintiff had no beneficial interest in the money claimed, and that he was suing only as trustee for the illegal Association. In both of the other two cases we have referred to above, the suit was dismissed on the ground that the plaintiff was simply an office-holder. The Judges who decided *Dawson* v. *Fox*(1) distinguished that case from *Crowther* v. *Thorley*(2), on the ground that, in the last mentioned case, the trustees carried on business in their own names and were themselves responsible. The Agent in the case before us is more like the trustee mentioned in *Crowther* v. *Thorley*(2) than the Trustees or Agent who filed the suits which were decided by the Queen's Bench Division.

We reverse the decree and direct the Sub-Judge to make a fresh decree. Each party will bear his costs of this application.

Application allowed. Decree reversed.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Dec. 2.

NAGENDRA BUTTA AND THREE OTHERS (DEFENDANTS) *v.* V. BASAPA GOWDA (PLAINTIFF).*

Mulgeni tenancy—Sale in execution—Application for review of judgment—Auction purchaser, a necessary party.

In execution of a decree certain immovable property was attached. One *S* intervened claiming to be proprietor and that the tenancy was only *mulgeni*. The claim was allowed and was subsequently confirmed by proceedings in a regular suit. The *mulgeni* rights had meanwhile been sold in execution and passed to a third party. The decree-holder applied for review of judgment in the regular suit. *Held*, that the auction purchaser of the *mulgeni* rights was a necessary party to the review proceedings, as the

* Civil Petition No. 131 of 1893-94, against the decree of the District Judge of Nagar, in O. S. No. 14 of 1888,

(1) L. R. 14 Q. B. Div., 379. (2) 32 W. R., 330.

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judgment-debtor had at the time of the review no interest in the property.

Mr. *S. Narayana Rao* for the appellant.

Mr. *D. Venkataramia* for the respondents.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The plaintiff was the assignee of a decree which had been passed against Mahabalia. He executed the decree against the debtor's son Iyapa by attachment of certain immovable property as if it belonged to the debtor. One Subraya Vydya claimed to be the proprietor of the land, and alleged that Iyapa was only *mulgeni* tenant. The claim was allowed. The creditor brought a suit to establish that the debtor was full owner and not merely a *mulgeni* tenant. The District Judge of Shimoga who tried the suit found that Subraya was the owner of the land, and that Iyapa was a *mulgeni* tenant, who was bound to pay Rs. 120-8-0 per annum to the landlord. The decree was confirmed on appeal by the Chief Court.

The plaintiff made an application for review of judgment. He filed certain documents to prove the debtor's proprietary right and alleged that Subraya and the debtor had fraudulently suppressed them. The District Judge was directed to find whether the documents were genuine, and whether it was true that it was only recently that the plaintiff came to know of their existence. The District Judge found against the plaintiff on both issues.

In the course of examination in the court below, the plaintiff admitted that he had executed the decree of the Chief Court, brought the *mulgeni* right to sale and purchased it himself. Subraya sued him for

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rent, got a decree for money and, in execution thereof, got the *mulgeni* right sold. One Siva Rao was the auction-purchaser and the sale has been duly onfirmed.

The question of law which arises upon these facts is, whether the plaintiff can press his application for review behind the back of the purchaser of the *mulgeni* right. We are of opinion that the finding must be against him. The judgment-debtor has at present no interest in the property. Siva Rao is the owner thereof subject to a payment of rent of Rs. 120-8-0 per annum to Subraya. The plaintiff's contention is that Subraya is not entitled to this rent. In other words, he contends that if the land had been sold as the absolute property of the debtor, it would have fetched a larger price. If it is found that Subraya had no interest in the land, the former sale must be quashed and a fresh sale ordered. The plaintiff contends that there is no need to make a fresh sale of the property, and that it is sufficient if the right to receive rent is sold. The right to receive rent is the right of Subraya and not that of the judgment-debtor, and the plaintiff has no power to execute his decree against any person other than his debtor. The judgment which is sought to be reviewed declared the respective rights of the debtor and Subraya. If the review is granted the decree of the Chief Court must be annulled, and a fresh decree passed declaring the absolute right of the debtor. The plaintiff will be entitled to execute the first decree in accordance with this declaration. When the purchaser of the *mulgeni* right is not a party to this proceeding it is impossible to relegate

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the parties to the right which they possessed before Subraya intervened as a claimant. Upon this ground we dismiss the petition with costs.

Petition dismissed with costs.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Dec. 4.

MALAPA (PLAINTIFF) *v.* PUTI MADA (DEFENDANT).*

Small Cause Suit—Suit for rent—Khadim tenancy—Possession—Amendment.

A suit for rent, brought on the small cause side of the court, was dismissed by the Munsiff on the ground that the defendant was a *khadim* tenant and that the document on which the suit was brought was an agreement for enhancement of rent and was not registered as required by the Land Revenue Code. *Held*, that the substantial question involved being whether the defendant was a *khadim* tenant, the plaintiff's right to the land, which was in possession of the defendant, was involved: and the suit should not be tried as a small cause. In ordering the suit to be brought on the ordinary file and tried as a regular suit, the court directed that if necessary the plaintiff should be permitted to amend the plaint so as to include a prayer for possession of the land.

Mr. *B. Nanjundapa* for the petitioner.

Mr. *L. Sreenivasa Iyengar* for the counter-petitioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

This was a small cause suit for rent. The plaintiff based his claim upon a contract of lease which was executed by the defendant. The genuineness of the document was denied by the latter. The Munsiff found in the plaintiff's favor. He, however, dismissed the suit on the ground that the defendant was a *khadim* tenant, that the document sued on was an agreement to pay enhanced rent and that the contract

* Civil Petition No. 70 of 1895-96, against the decree of the Munsiff of Nanjangud, in S. C. No. 715 of 1894-95.

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was not enforcible since the document had not been registered, as enacted by s. 89 of the Land Revenue Code. This is an application made by the plaintiff under s. 622 of the Procedure Code. 1895 MALAPA v. PUTI MADA.

The substantial question which is involved in the suit is, whether the defendant is a *khadim* tenant. The question affects the plaintiff's right to the land which is in defendant's possession. We are of opinion that the suit ought not to have been tried as a small cause suit. We reverse the decree and direct the Munsiff to bring the suit on the file of ordinary suits and to pass a fresh decree. If necessary the plaintiff may be permitted to amend the plaint so as to include a prayer for possession of the land. The amendment, if made, will give no room for argument whether a second appeal will lie in a suit for rent for less than Rs. 50. The costs of the application will abide the result.

Application allowed.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge. Dec. 6.

SIDNEY SMITH (PLAINTIFF) *v.* B. A. BRITO AND TWO OTHERS (DEFENDANTS).*

Civil Procedure Code (Act XIV of 1882) s. 32—Removal of defendants' names after the first hearing.

An order was made after the first hearing of a suit for the removal of certain defendants' names from the record. *Held*, that this could not have been an order under s. 32 of the Civil Procedure Code as that section authorises such order being made only "on or before the first hearing," and consequently it was not appealable under clause 2 of s. 588.

The court below acted illegally in making such an order, as there is no provision of law authorising the removal of a defend-

* Civil Revision Petition No. 46 of 1894-95, against the order of Mr. B. Tirumalacharier, District Judge of Nagar, in O. S. No. 26 of 1891, dated the 4th day of August 1894.

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ant's name from a suit after the first hearing. The Chief Court therefore interfered under s. 622 of the Civil Procedure Code and set aside the order.

The Order of the Chief Court (BEST, *C.J.* and MEENACSHAYA, *J.*) was as follows :—

The appeal is not pressed so far as it relates to the Judge's ruling on the stamp duty payable on the deed of the 11th July 1882.

The only other point is with regard to defendants No. 2 and No. 3 being necessary parties to the suit. The order cannot be held to have been made under s. 32 of the Code of Civil Procedure, as it was not made "on or before the first hearing." Consequently the order is not one appealable under clause 2 of s. 588 of the Code. This objection was foreseen by the appellant who has also filed a petition under s. 622 of the Code which is applicable when the order is proved to be one against which no appeal lies, if the court has acted in the exercise of its jurisdiction illegally or with material irregularity.

In the present case, the court below must be held to have acted illegally as there is no provision of law authorising the removal of the defendants' names from a suit after the first hearing. If parties have been wrongly or unnecessarily joined as defendants, they will be entitled to their costs when the decree is passed. An order, such as the one in question, intermediate between the settlement of issues and the decree in the suit is nowhere provided for in the Code.

We, therefore, set it aside, without any expression of opinion as to the correctness or otherwise of the Judge's findings on the several issues that have been

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considered by him in what he calls his "Preliminary Judgment."

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The costs of the petition under s. 622 will be costs in the suit.

Order set aside.

Before A. Ramachendra Iyer and O. Meenacshaya, Judges.

Dec. 12.

DASA (DEFENDANT No. 3) v. CHENA THIMA AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (Act XIV of 1882) s. 373—Withdrawal of suit with liberty to bring a fresh one—Grounds for such order—Ignorance—Minority.

After settlement of issues and the adjournment of final hearing, the plaintiffs were permitted to withdraw the suit with liberty to bring a fresh one because "their pleader represented that plaintiff No. 1 was an ignorant man and it would be well to allow plaintiff No. 2 to sue after he had attained his majority." *Held*, that the ignorance of the first plaintiff was no ground for the order and as to the alleged minority of the second plaintiff it was not a valid ground and the statement that he was a minor could not be right as it was one of the points for trial.

Mr. *L Srinivasa Iyengar* for the pititioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

We are of opinion that the Munsiff did not judiciously exercise the power which is conferred upon him by s. 373 of the Code of Civil Procedure. The plaintiffs alleged that defendant No. 1 was the widow of an undivided member of their family, and that she had no right to hold possession of the family property or to alienate it. The suit was for ejectment. The widow and those who have purchased from her denied the allegation as to non-division, and pleaded that the second plaintiff was not a minor. Issues were framed and the final hearing was adjourned more than

*Civil Petition No. 77 of 1895-96, against the order of Mr. C. Subba Rao, Munsiff of Tumkur, in O. S. No. 309 of 1894-95, dated the 3rd day of March 1895.

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once. At that stage of the suit, the Munsiff permitted the plaintiffs to withdraw it with liberty to bring a fresh one, because their pleader represented that plaintiff No. 1 was an ignorant man, and that it would be well to allow plaintiff No. 2 to sue after he should have attained his majority. The alleged ignorance of plaintiff No. 1 is of course no ground for allowing him to bring a second suit and we are surprised that the Munsiff considered it a ground at all for making an order under s. 373. As to the alleged minority of plaintiff No. 2, it was not a valid ground and the Munsiff was not right in stating that he was a minor when it was one of the points for trial. We set aside the order, and direct the Munsiff to restore the suit to his file and proceed with its trial. The costs of the application will be paid by plaintiffs.

Order set aside with costs.

Dec. 13.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

PILAPA (DEFENDANT NO. 4) v. NANJUNDAPA (PLAINTIFF).*

Revenue sale—Subsequent purchase—Title.

The alleged title of a purchaser of immovable property under a purchase subsequent to a Revenue sale cannot be recognised, so long as the sale remains uncancelled.

Mr. *S. Ramaswamiengar* for the appellant.

Mr. *B. Srinivasa Iyengar* for the counter-petitioner.

The Order of the Chief Court (BEST, *C. J.* and MEENACSHAYA *J.*) was as follows :—

Petitioner's purchase is subsequent to the Revenue sale. As long as that sale remains uncancelled, petitioner's alleged title cannot be recognised. The Sub-Judge's decree must be held to be correct and this petition dismissed with costs.

Petition dismissed with costs.

*Civil Petition No. 96 of 1895-96, against the decision of Mr. S. Venkatavaradan Iyengar, Sub-Judge of Bangalore, in S. C. No. 2589 of 1894-95, dated the 12th day of August 1895.

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Before J. W. Best, Chief Judge and C. Meenacshaya, Judge. 1895 *Dec.* 13.

B. MATHODAPA (PLAINTIFF) *v.* HIRANANDA HASTE RATHA KRISHNA DOSS SAIT (DEFENDANT).*

Partnership—Debt due to partnership—Suit by one partner alone—Heirs of deceased partner.

Where there were three partners in a firm one of whom had died and another had assigned to the second surviving partner his interest in a debt due to the partnership. *Held,* that the last could sue for recovery of the debt without joining the heirs of the deceased partner.

Mr. *S. Ramaswamier* for the petitioner.

Mr. *S. Naraina Rao* for the counter-petitioner.

The Order of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

The suit has been dismissed by the Sub-Judge on the ground that the plaintiff is not competent to sue alone for a debt due to a partnership.

It appears that there were three partners, one of whom assigned his interest to the plaintiff and the other is dead.

In these circumstances it is competent to the plaintiff to sue without joining the heirs of the deceased partner: *Motilal Bechardass* v. *Ghellabhai Hariram*(1) and *Vaidyanatha Ayyar* v. *Chinnasami Naik*(2).

We set aside the decree dismissing the suit and remand the case for disposal on the merits.

The plaintiff is entitled to the costs of this petition from the defendant.

Application allowed with costs.

*Civil Petition No. 50 of 1895-96, against the decree of Mr. S. Venkatavaradan Iyengar, Subordinate Judge of Bangalore, in S. C. No. 1029 of 1894-95, dated the 24th day of June 1895.

(1) I. L. R. 17 Bom., 6. (2) I. L. R. 17 Mad., 108.

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Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

THAMANA AND TWO OTHERS (DEFENDANTS NOS. 1, 4 AND 8) *v.* VENKATARAMANIA (PLAINTIFF).*

Joint proprietors—Arrangement for each to take rent from specified tenants—Payment of rent by tenant to one of joint owners.

Held that in a case of joint proprietorship of land, as the agreement was not contrary to the terms of the lease, the arrangement should be enforced that had been entered into for each proprietor to collect a moiety of the rents and that each should hold certain tenants as persons bound to pay rent exclusively to him. *Further*, that a tenant who *bonâ fide* paid rent to a joint owner was entitled to protection and the owners ought to be left to settle accounts between themselves.

Mr. *S. Ramaswamier* for the petitioners.

Mr. *D. Venkataramia* for the counter-petitioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

We have resolved to rescind the decree and to send the case back to the Munsiff with directions to frame fresh issues and to pass a fresh judgment.

If the plaintiff and those who acted as his guardians and Putia or his successor in interest, namely, defendant No. 7, arranged between themselves that each should collect a moiety of the rent due to him, and that each should hold certain tenants as persons who were bound to pay rent exclusively to him, the arrangement was not contrary to the terms of the registered lease and the Munsiff was bound to enforce it. He will frame an issue on the point and allow an opportunity to the parties to adduce evidence thereon.

The tenants said that a moiety of the rent had

* Civil Petition No. 79 of 1895-96, against the decree of Mr. P. A. Sivaprakasam Pillay, Munsiff of Hole Narasipur, in S. C. No. 166 of 1894-95, dated the 24th day of June 1895.

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been paid to defendant No. 7 and the latter admitted it. The Munsiff refused to consider the point as he was of opinion that defendant No. 7 was in collusion with other defendants. That defendant was joint owner of the property and he and the plaintiff were jointly entitled to collect the rent. In the absence of an arrangement to the effect that defendant No. 7 ought not to collect rent, it would seem that the tenants were justified in paying rent to him. The Munsiff has not discussed whether any arrangement had been made with the tenants for payment of rent by them and whether they had acted contrary to it. If there was no definite arrangement, the tenants who *bonâ fide* paid rent to a joint owner are entitled to protection, and the owners ought to be left to settle accounts between themselves. The costs of this petition will abide the result.

Application allowed.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Dec. 20.

SIDRAMA (PLAINTIFF) v. BYLI AND OTHERS (DEFENDANTS).*

Guardian—Sale by person acting as guardian—Binding effect—Substance of transaction to be looked at.

Where a sale of minor's property was made by a person who did not in the transaction say in terms that she was acting as guardian and sold the property for the minor's benefit, *held*, that the substance of the transaction should be looked at and not the letter of the document: and as the circumstances left no doubt that the woman was the minor's guardian and sold the land to discharge a family debt, it was binding upon him.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

This is an application for review of judgment passed in Regular Appeal 277 of 1894-95. It is alleged

* Review Petition No. 102 of 1895-96, against the decree of the Munsiff of Tumkur, in O. S. No. 170 of 1893-94.

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that the plaintiff was not bound by the sale, inasmuch as the woman who made it did not say in terms that she acted as the plaintiff's guardian and sold the property for his benefit. We should look at the substance of the transaction and not the letter of the document. Looking at the substance, we have no doubt that the woman was the plaintiff's guardian and that she sold the land to discharge a family debt. We dismiss the application.

Application dismissed.

Dec. 20.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of VENKAT RAO (PETITIONER).*

Appeal in formâ pauperis—Civil Procedure Code (Act XIV of 1882) ss. 592 and 622—Revision.

Where a District Judge in rejecting an application to appeal *in formâ pauperis* stated that the decree appealed against ought to be confirmed, *held* there was no ground for revision of the order of rejection as the order made under s. 592 of the Civil Procedure Code was not defective in any particular.

Mr. *Vencata Rao* for the petitioner.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The petitioner's application to appeal *in formâ pauperis* was rejected by the District Judge of Mysore under s. 592 of the Code of Civil Procedure. The petitioner has made an application under s. 622 of the Code to revise the order.

Section 592 enacts that the court to which an application to appeal *in formâ pauperis* has been made shall reject it unless it sees reason to think that the decree appealed against is contrary to law or is otherwise erroneous or unjust. When the judge has found for reasons stated in the order that the decree

* Civil Petition No. 122 of 1895-96, against the order of the District Judge of Mysore, in Miscellaneous Application No. 167 of 1895-96.

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appealed against ought to be confirmed, we do not see how we can compel him to think otherwise and to entertain the application.

The petitioner who argued that we have power to quash the District Judge's order referred us to the case of *In the matter of Moshaollah Khan*(1). We have studied the judgment and are of opinion that it is not applicable to the case before us. The learned Judges of the High Court of Calcutta who decided the case were of opinion that the order rejecting the application to appeal *in formâ pauperis* did not state reasons for the conclusion, and that certain facts appeared to have been lost sight of and accordingly they directed the judge to reconsider the order. The order which has been passed by the District Judge in the case before us is not defective in any respect. He has carefully considered the judgment appealed against and come to the conclusion that the petitioner had no *primâ facie* grounds for making an appeal. This is not a case in which we can exercise our powers as a Court of Revision, and we direct that the application be dismissed.

Application dismissed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and C. Meenacshaya, Judges.

April 8.

SINGARAVELU MUDALIAR (PETITIONER) *v.* THE PRESIDENT, MUNICIPAL COMMISSION, BANGALORE CITY (COUNTER-PETITIONER).*

Bangalore Town Municipal Regulation, 1871, ss. 34, 58 and 78—License for retail-sale of foreign liquor—Mode of assessment—Appeal to District Judge.

Held, that under the Municipal Regulation, the imposition of

*Referred Case No. 1 of 1894-95, from Mr. T. Narahari Rao, District Judge of Nundidroog Division, in Miscellaneous Case No. 229 of 1894-95, dated the 20th day of February 1895.

(1) 14 W. R. 445.

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taxes has to be based on the income or profits of those liable to be taxed; and it is imperative on the Municipal President to make the classification required by the Regulation before demanding a particular rate from any particular person. *Also*, the fee for retail sale of foreign liquor is undoubtedly a tax upon the sale of spirituous and intoxicating liquors within the meaning of s. 34 and other sections of the Regulation, and not merely a registration fee. An appeal against the assessment therefore lay to the District Court.

The Opinions of the Chief Court (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) were as follow :—

THUMBOO CHETTY, *C.J.* and MEENACSHAYA, *J.*—This is a reference made by the District Judge of Bangalore, under s. 78 of the Bangalore Town Municipal Regulation, 1871.

One Patchapa Mudaliar and three others, who are license-holders for the retail sale of foreign liquor in the City of Bangalore, were taxed with the payment of Rs. 50 each under schedule C II, class II, referred to in s. 58 of the said Regulation and required to take out a certificate of registration.

Against the imposition of the tax the said Patchapa Mudaliar and others appealed to the District Judge, on the ground that the tax has been imposed arbitrarily and without determining the classes under which the liquor shops in the City, or the persons holding licenses to sell liquor, were liable to be taxed.

The District Judge has referred for the opinion of this court the following question :—

"Whether or not the rate to be assessed under classes II to IV of Schedule C II, referred to in s. 58 of the Regulation, should depend mainly though not wholly on the profits or income of the dealer in such business."

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The question is not framed clearly; but, from the arguments of the appellant's counsel before us, we understand that the gist of the appellant's contention was, that the profits of the shop or license-holder should, in each case, be ascertained and that the shops or persons holding licenses should be classified with reference to the profits or income realised from such shops, before they could be called upon to pay the maximum rate of Rs. 50 or any of the next lower rates Rs. 25 or 12, under class II, III or IV respectively.

This seems to be a valid contention.

Reading Schedule C II with that which precedes it, there can be no doubt that the imposition of taxes has to be based on the income or profits of those liable to be taxed.

When, in Schedule C II, the Legislature prescribed three different rates for three different classes of retail dealers carrying on the same trade or profession, it is quite evident that it was intended there should be a careful classification of persons and shops under the three classes separately and that it was imperative on the Municipal President to make the classification before demanding a particular rate from any particular person.

It was admitted by the advocate who appeared for the Municipality that no such classification has been determined upon in the City Municipality, though it has been done in the Municipalities of Mysore and the Civil and Military Station of Bangalore. The maximum rate of Rs. 50, which is applicable only to persons falling under Class II, has been imposed upon appellants without regard to their incomes or

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profits. The procedure indicated in s. 59 of the Regulation does not appear to have been followed, and till that is done, it is impossible to say under which class the appellants are liable to be taxed.

In determining the classes under s. 59, the Municipal President has, of course, to take into consideration the average income of the persons or liquor shops liable to be taxed under Schedule C II and classify them accordingly. To impose a single rate of Rs. 50 on all persons and shops under Class II and to ignore altogether Classes III and IV as if they were not prescribed by the Legislature is, to say the least, arbitrary and illegal.

The foregoing observations are sufficient to enable the District Judge to dispose of the question raised by him.

The advocate for the Municipal Board contended that no appeal lay to the District Judge under s. 78 as what was imposed on appellants was merely a registration fee and not a tax; but reading ss. 34, 58 and 59 together with s. 78 of the said Regulation, there can be no doubt that the fee demanded under Schedule II C is a tax upon the sale of spirituous and intoxicating liquors within the meaning of the said sections and especially of s. 34. The objection is therefore untenable.

Since writing the above we have had the advantage of reading the opinion recorded by our learned colleague Mr. Ramachendra Iyer, and, as already pointed out, it is incumbent on the Municipal Commissioners to make the classification of rates preparatory to assessing appellants at any particular rate; and in mak-

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ing the classification, the income of the persons or liquor shops liable to be taxed under Schedule C II has, of course, to be taken into consideration.

RAMACHENDRA IYER, *J.*—The case has been referred by the District Judge of Bangalore under the provisions of s. 78 of the Bangalore Municipal Regulation of 1871. The advocate who appeared for the Municipal Commissioners urged a preliminary objection that no appeal lay to the District Judge. It is sufficient to observe that the appeal was not filed in this court and that the objection ought to be urged before the judge who is invested with power to decide it.

The appellant who is a retail dealer in wines, beer and spirits was ordered to pay a tax of Rs. 50 for registration of his place of business under s. 58 of the Regulation. He paid the sum and lodged an appeal in the District Court alleging that he ought to be registered under Class IV of Schedule C II. The point on which the District Judge has sought the decision of the Chief Court is "Whether the rate to be assessed under Classes II to IV of Schedule C II should depend mainly, though not wholly on the profits or income of the dealer in such business?"

The judge has not clearly stated a case for decision, as he has introduced an uncertain element into the question which does not admit of an unambiguous answer. He ought to have stated what elements other than the profits or income of the business he had in view when he proposed the question. He ought to have fully discussed the point and explained how the opinion of this court would enable him to come to a decision. He may demand whatever assistance may be needed to enable him to despatch the

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business which is brought before him under the Regulation. It is not within our province to consider economical questions in the abstract.

If the Municipal Commissioners were not represented in this Court by an advocate and if their case was not explained to us, I would have required the District Judge to submit a fresh statement of the case. I gather from Mr. Subbarao's argument that the Municipal Commissioners have passed a resolution to the effect that all retail dealers' incomes from spirits shall be registered under class II of Schedule C II and they shall be required to pay a tax of Rs. 50 each. The appellant contends that it is not lawful to register all dealers under one and the same class. This being the point in issue I apprehend that the question which the District Judge has referred for decision is whether the Commissioners ought not to have laid down rules for determining under which class in Schedule C II a dealer shall be registered, and whether they were right in determining to register all dealers under one class irrespective of the profits of or the capital sunk in, the business.

There are four classes of dealers mentioned in Schedule C II; and s. 59 of the Regulation enacts that the President shall determine *under which of the classes* every person or liquor shop liable to be taxed shall be registered. The resolution of the Commissioners to ignore three out of four classes is against the policy of the Regulation. A comparison of Schedules A and B with Schedules C and C II is instructive. The Regulation did not intend to make a distinction, for instance, between horses and horses, for the purpose of levying taxes or tolls under the first two schedules, and we

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find all horses grouped under one class. There are merchants and merchants, and the Regulation did not intend to put them all on the same footing for the purpose of levying license-tax from them. Accordingly Schedule C has distributed them among six classes and the principle of classification would seem to be the capital invested in or the gross rental of the place of business. We must infer the same intention when we find that Schedule C II has distributed retail dealers among four classes. The amount of capital or gross rental of shops was not mentioned in Schedule C, most probably because knowledge of the conditions or peculiarity of retail trade in the City was needed to attempt a fair classification, and it was thought that the Municipal Commissioners were best qualified to tackle the question. They ought to have laid down rules for classifying retail dealers under the Schedule. If afterwards a dispute arises between an individual trader and the Municipality in regard to the class under which he ought to be registered, it is a question of fact as to the application of the rules to the individual case.

It is the Commissioners who have to make the classification and not the District Judge. The principle of classification has been intentionally left to be dealt with by them and it is not for us to lay down rules for their guidance. It is sufficient to observe that until rules are laid down, effect cannot be given to Schedule C II and no tax can be levied.

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April 10.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and C. Meenacshaya, Judges.

VENKATESAPA (PLAINTIFF) *v.* RAMAPA (DEFENDANT).*

Stamp Act (I of 1879) Schedule I, Art. 21—Sale—Conveyance.

An instrument purporting to be a sale-deed of fuel for a fixed sum, is not an agreement to sell but a conveyance chargeable with duty under Sch. I, Art. 21 of the Stamp Act.

Under s. 50 of the Stamp Act, the Deputy Commissioner of Kolar referred to the Chief Court for adjudication as to the proper stamp-duty payable thereon, the document of which the following is a translation:—

Karar dated 6th October 1892 in favor of Gavana's son Venkatesapa, residing at Pura of the Kamasandra Sammath; by Ramapa, son of Bomasandra Venkatapa at Poyi Somipalli of the said Sammath:—

The firewood of the kinds of karigali, biligali, honge, nerale and hebbevu trees standing on the lands in my holding and within the limits of the bond stones, bearing Survey Nos. 33, 39, 40 and 41, *i. e.*, on the available fifty tons of firewood of this description, measuring two and a half yards by a three and a half rule per ton, I have settled a rate of Rs. 4-12-0 per ton; and I have this-day received from you Rs. 50 as an advance at the rate of one rupee per ton. The cost of license for cutting and removing the fuel should be borne by you only. I shall have nothing to do with the same. I shall give to you all the firewood that may be had of my holding. If I give it to others, I shall be liable to pay the profits that may be realised thereon at the Camp (Gold Mining Camp). Thus runs the document :—

Mark of Venkatapa's son Ramapa.
Attested by three witnesses.

The Opinion of the Chief Court (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

This is a reference by the Deputy Commissioner

* Referred Case No. 2 of 1894-95, from the Deputy Commissioner of Kolar, submitting a document on which the Munsiff of Kolar Gold Fields has levied a stamp-duty of eight annas with a penalty of Rs. 5, in O. S. No. 270 of 1894-95, on the file of the said Munsiff.

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and Collector of Stamp Revenue of Kolar District under s. 50 of the Stamp Act. 1895

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The instrument referred to us for adjudication of stamp-duty purports to be a conveyance by which one Ramapa sells to Venkatapa fifty tons of fuel at Rs. 4-12-0 per ton, the total price amounting to Rs. 237-8-0. The instrument is on plain paper and the Munsiff of Kolar Gold Fields viewing it as an agreement to sell, levied a duty of As. 8 and Rs. 5 being ten times the duty as penalty.

We are clearly of opinion that the Munsiff was wrong in treating it as an agreement to sell. It is a conveyance, under Art. 21 of the first schedule, and as such is chargeable with a duty of Rs. 3 and a penalty of Rs. 30.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, C.I.E., Chief Judge, A. Ramachendra Iyer and C. Meenacshaya, Judges. July 15.

VENKATACHELUM PILLAY (PLAINTIFF) v. PATEL THIME GOWDA (DEFENDANT).*

Stamp Act (I of 1879)—Submission to arbitration—Agreement not otherwise provided for.

A document divisible into two parts, of which the former is a submission to arbitration and the latter an agreement made in pursuance of the award given under the arbitration, is chargeable with two duties of eight annas each, *i. e.*, as an award and as an agreement not otherwise provided for.

The document of which the following is a translation was referred to the Chief Court by the Deputy Commissioner of Kolar, for adjudication:—

Karar dated 10th June 1893, executed in favor of 1. Mamoosabi; 2. Abdullasabi; 3. Gangadarachari; 4. Thime Gowda and other

* Referred Case No. 3 of 1894-95, from the Deputy Commissioner of Kolar District, in O. S. No. 139 of 1894-95, on the file of the Munsiff of Kolar Gold Fields.

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punchayetdars, by Venkatachellum Pillay, Munisami Mudali, Narayanasami Mudali and others signed below, all residing at Ooregaum.

We, the executants of this karar, agree to abide by the decision arrived at by you (the arbitrators). If any one should disagree with the same, he shall have no claim to the *bhajanay* house at Ooregaum. Thus runs the karar.

All have signed here in Tamil.

According to the decision of the arbitrators I (Venkatachellum Pillay) have this day received Rs.200 (two hundred only) the amount spent by me in getting the *bhajanay* house built. Henceforward I shall subscribe as much as I can just as the other members of the *kutam* do. Then only I shall have claim to the *bhajanay* house. If any one should fail to subscribe he shall have no claim whatever. This *bhajanay* house does not belong to any individual. None will have any claim to sell, mortgage, or give away in gift to others, &c.

We have this day entrusted the key of this *bhajanay* house to Rayachoor C. Narayanasawmi Mudali who will also get the repairs done to the *bhajanay* house, whenever it is necessary after collecting the subscriptions from the members. If the above said person should fail to manage it properly we are empowered to appoint another man instead.

Here signed in Tamil by several persons.

The Opinion of the Chief Court (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

We are of opinion that the first part of the document is a submission to arbitration, and that it ought to bear a stamp of eight annas only.

The latter part of the document is not an award. It is rather an agreement made by the villagers regarding the right to and management of the *bhajanay kutam*, and it appears from the terms of the document that they entered into the arrangement in accordance with the opinion of the arbitrators. The arbitrators, the villagers and witnesses have affixed their signatures. It is an agreement which has not

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been otherwise provided for, and it ought to bear a stamp of eight annas. The Munsiff levied Rs. 5-8-0 on the 19th January 1895, and another sum of Rs. 5-8-0 on the 29th January 1895. No more duty or penalty is leviable.

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VENKATA-CHELLUM PILLAY *v.* PATEL THIMMA GOWDA.

Dec. 6.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

Execution Case No. 584 of 1895-96.

HANUMIA (PLAINTIFF) *v.* BOMIA (DEFENDANT).*

Execution Case No. 526 of 1895-96.

PUTAPA (PLAINTIFF) *v.* MALIGAPA (DEFENDANT).*

Execution Case No. 772 of 1895-96.

MUNIAPA (PLAINTIFF) *v.* PAYANA AND ANOTHER DEFENDANTS.)*

Civil Courts Regulation (No. I of 1883), s. 16—Mofussil Small Cause Courts Act (XI of 1865) s. 20—Small Cause Court—Execution of decree against immovable property.

The Court of a Sub-Judge invested with Small Cause jurisdiction under s. 16 of the Civil Courts Regulation, No. I of 1883, is the proper court to execute a decree passed by it as such Small Cause Court for a sum not exceeding Rs. 100 when execution is sought to be effected by attachment and sale of immovable property.

The Opinion of the Chief Court (BEST, *C.J.* and MEENACSHAYA, *J.*) was as follows:—

The question referred for our decision appears to be, whether the court of a Sub-Judge invested with small cause jurisdiction under s. 16 of the Civil Courts' Regulation No. 1 of 1883, is the proper court to execute a decree passed by it as such Small Cause Court for a sum not exceeding Rs. 100 when execution is sought to be effected by attachment and sale of *immovable* property. We answer the question in the affirmative.

The Sub-Judge is of opinion that such a decree can be so executed only by a Munsiff whose ordinary

* Referred Case Nos. 1 to 6 of 1895-96 from the Subordinate Judge of Bangalore, in Execution Cases Nos. 584, 526, 772, 773 and 524 of 1895-96 and 2594 of 1894-95.

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jurisdiction extends to matters not exceeding Rs. 1,000 in value, while that of a Sub-Judge "commences from over Rs. 1,000" as laid down in ss. 9 and 10 of the Regulation. There is, however, nothing in s. 9 to support the view that the Sub-Judge's jurisdiction "commences" at Rs. 1,000. What the section says is, that the jurisdiction of a Sub-Judge shall extend to original suits and proceedings of a civil nature (not otherwise excepted) of which the amount or value of the subject-matter "does not exceed Rs. 5,000." No doubt the following section similarly confers on Munsiffs jurisdiction in suits or proceedings of amount or value not exceeding Rs. 1,000; and s. 15 of the Code of Civil Procedure requires that every suit shall be instituted in the court of the lowest grade competent to try it. But it cannot be held that the result is that a Sub-Judge is hereby deprived of all jurisdiction in matters of value under Rs. 1,000, which is included in the jurisdiction in matters of value "not exceeding Rs. 5,000" (without any minimum) expressly conferred by s. 9 of the Regulation.

Moreover, as pointed out by the Bombay High Court in *Bhagavan Dayabji* v. *Balu*(1), the investing of a Subordinate Judge with special jurisdiction, as in the present case, does not constitute his court a Small Cause Court under Act XI of 1865. A court exercising the powers of a Small Cause Court, in such a case, is one of the "other courts exercising the jurisdiction of a Court of Small Causes" referred to in s. 5 of the Code of Civil Procedure and as such

(1) I. L. R. 8 Bom., 230.

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court, its procedure is governed by the Civil Procedure Code which contains no section corresponding to s. 20 of Act XI of 1865. 1895

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For the purpose in question, the two branches or sides of the Sub-Judge's court may be regarded as different courts, seeing that they exercise different powers, and under cl. *(d)* of s. 223 of the Code, a decree passed by the court in its Small Cause Court jurisdiction can be transferred to the other branch of the same court for execution for reasons to be recorded in writing; and as pointed out in *Ravji Ranchod Naik* v. *Vishnu Ranchod Naik*(1) a "suggestion and an order recorded in the case are sufficient, without a formal transmission as to a distant tribunal."

As s. 20 of Act XI of 1865 is inapplicable, the order of the Sub-Judge directing these cases to be transmitted to the Bangalore Munsiff under that section is irregular and must be reconsidered.

Order set aside.

APPELLATE CRIMINAL.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge. *Feb.* 13.

MALAPA (ACCUSED) *v.* THE GOVERNMENT.*

Defamation—Publication of rumours—Good faith—Indian Penal Code (Act XLV of 1860) s. 52.

The mere fact that a person heard from others statements prejudicial to a third party is no justification for his publishing such information without taking care to ascertain its truth. Under s. 52 of the Indian Penal Code, nothing is said to be done or believed in good faith unless it be done with due care and attention.

*Criminal Appeal No. 91 of 1894-95, against the conviction and sentence by the General Assistant Commissioner and First-class Magistrate of Kolar, in Criminal Case No. 25 of 1894-95.

(1) I. L. R. 9 Bom., 241.

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The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

This is a clear case. The mere fact that the appellant heard from others that the complainant said that he had given a bribe in connection with a contract he had obtained from the Public Works Department, is not a justification for his publishing the information to the prejudice of another without taking care to ascertain its truth. The imputation made in the petition which accused sent to the Deputy Commissioner, was made recklessly and not in good faith, as under s. 52, Indian Penal Code nothing is said to be done or believed in good faith, which is done or believed without due care and attention.

We dismiss this appeal.

Appeal dismissed.

Feb. 13.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

RANGA (ACCUSED) v. THE GOVERNMENT.*

Theft—Theft in a railway carriage—Indian Penal Code (Act XLV of 1860) ss. 379, 380.

A railway carriage does not come within the definition of a building used as a human dwelling within the meaning of s. 380 of the Indian Penal Code. While therefore, holding that the circumstances of the case proved that the accused had committed theft from a railway carriage, the conviction was altered from one under s. 380 to one under s. 379.

The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

We do not entertain any doubt as to the propriety of the conviction of the accused. The circumstances

* Criminal Appeal No. 99 of 1894-95, against the conviction and sentence by the General Assistant Commissioner and First-class Magistrate of Tumkur, under s. 380 of the Indian Penal Code and cl. 1, s. 100 Mysore Railway Regulation IV of 1894, in Criminal Case No. 73 of 1894-95, dated the 12th day of January 1895.

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elicited in the evidence of the prosecution witnesses, *viz.*, that the accused stealthily got out of the railway carriage while it was in motion, that he travelled beyond his destination, and that the stolen bag was discovered not far from the place where he jumped out of the train, all point to his having stolen the said bag which belonged to prosecution first witness. The conviction properly ought to have been under s. 379, Indian Penal Code, for simple theft, as a railway carriage does not come within the definition of a building used as a human dwelling within the meaning of s. 380. We alter the conviction accordingly. The sentence is not too severe.

We dismiss this appeal.

Conviction altered. Appeal dismissed.

March 8.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

KARIA (ACCUSED) *v.* THE GOVERNMENT.*

Indian Penal Code (Act XLV of 1860) ss. 304 and 333—Intention to kill—Knowledge that act would end in death.

Where a man, seeing his wife and the accused committing adultery in a field, ran towards the place and finding a stone on the way flung it at and killed the deceased. *Held* that an intention to kill could not be inferred nor did the circumstances shew that the accused knew his act would end in death. The conviction was therefore altered to one under s. 323 of the Indian Penal Code and the sentence reduced to two months' rigorous imprisonment.

The Judgment of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

The prisoner's statement shows that when he saw his wife and the deceased committing adultery in a

*Criminal Appeal No. 97 of 1894-95, against the conviction and sentence by the Sessions Judge of Nagar, under s. 304 of the Indian Penal Code in Shimoga Sessions Case No. 6 of 1894-95.

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field, he ran towards the place and happening to find a stone on the way he flung it at the deceased. We cannot infer an intention to kill, and considering that it was a stone used only once and that no subsequent violence was used, we are not prepared to hold that the prisoner knew that his act would end in death. We consider it safer to alter the conviction to one under s. 323 of the Indian Penal Code and reduce the sentence to two months' rigorous imprisonment.

Conviction altered. Sentence reduced.

March 11.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

Appeal No. 108 of 1894-95.

THAMIA ALIAS MANJA (ACCUSED) v. THE GOVERNMENT.*

Appeal No. 109 of 1894-95.

KRISHNACHARY (ACCUSED) v. THE GOVERNMENT.*

Indian Penal Code (Act XLV of 1860) ss. 193, 194—False evidence—Retracting evidence in Sessions Court—Value of evidence—Measure of punishment.

Where a witness for the prosecution made different statements before the Committing Magistrate and the Sessions Court on comparatively minor points, *held* that he ought to have been convicted in the alternative of having given false evidence either before the Magistrate or the Sessions Judge under s. 193 only. The contradiction being on a minor point, the sentence was reduced.

Where another witness for the prosecution also retracted his evidence in the Sessions Court, but that which he gave before the Magistrate was not convincing and its weight was considerably reduced by the contradictory evidence of the only other eye-witness, it was *held* that there was no reason to imagine that a true charge broke down by the evidence he gave before the Sessions Court and such being the value of his evidence, the sentence was reduced.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

We are of opinion that the Sessions Judge was not right in finding that both prisoners were guilty of

* Criminal Appeals Nos. 108 and 109 of 1894-95, against the convictions and sentences by the Sessions Judge of Nagar, under s. 193 or 194 of the Indian Penal Code in Shimoga Sessions Cases Nos. 4 and 5 of 374 of 1894-95, dated the 15th day of January 1895.

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having given false evidence either under s. 193 or s. 194 of the Penal Code. The Judge ought to have made a distinction between the two cases. The evidence which Thima gave before the committing Magistrate in the former case was to the fact that Ramachendra beat the deceased with a plank. He mentioned generally that Padma also beat the deceased. However when he was asked to give a detailed account, he implicated Ramachendra only and, towards the end of his evidence, he distinctly stated that he did not see either Venkata or Padma do anything to the deceased. There was then no evidence under s. 194 against the two persons who were charged with murder in that case. When he retracted the evidence in the Sessions Court, he denied having been present when the deceased was beaten or having seen Padma on that occasion. His evidence would have little or no bearing upon the question which was in issue in that case if he repeated the evidence he had given before the Magistrate. So far as we can judge, the offence consisted in having contradicted himself on two comparatively minor points. He ought to be convicted in the alternative of having given false evidence either before the Magistrate or the Sessions Judge under s. 193 only. As the contradiction was on a minor point, we think that he did not commit a grave offence such as to deserve three years' imprisonment. We reduce the sentence to three months' rigorous imprisonment and remit the fine.

The other prisoner Krishnachary did distinctly implicate the persons who had been accused of murder, and his conviction ought to be upheld. We think that the sentence ought to be reduced. The evidence

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which he gave before the Magistrate does not seem convincing. The weight which was due to his evidence was considerably reduced by the contradictory evidence which was given by the only other man who was alleged to have been present on the occasion. There seems no reason to imagine that a true charge broke down by the evidence which he gave before the Sessions Judge. This being our impression in regard to the value of his evidence, we reduce the sentence to nine months' rigorous imprisonment and remit the fine.

Conviction upheld. Sentence reduced.

Nov. 11.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

LEWIS ROZARIO, APPELLANT (ACCUSED NO. 1) v. THE GOVERNMENT).*

Whipping Act (VI of 1864) ss. 2 and 3—Same offence—Abetment.

It is only when a prisoner has been previously convicted of the *same* offence, being one specified in s. 2 of the Whipping Act, that he can under s. 3 of the Act be punished with whipping in addition to other punishment. Abetment is not one of the offences specified. A conviction for offences under ss. 380 *or* 411 of the Penal Code is not the same as a subsequent conviction for offences under ss. 457 and 380 of Penal Code: and a sentence of whipping in addition to rigorous imprisonment for the latter, is therefore improper.

The Judgment of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

There was abundant evidence to support the conviction. The appellant has not urged any reason for disbelieving the prosecution witnesses. We agree in the Magistrate's finding that the prisoner was guilty

* Criminal Appeal No. 38 of 1895-96, against conviction and sentence by the Magistrate of Kolar Gold Fields, under ss. 379 or 411 of the Indian Penal Code, in Criminal Case No. 32 of 1895-96.

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of an offence under s. 379 or s. 411 of the Indian Penal Code.

The Magistrate has sentenced the prisoner to undergo rigorous imprisonment for one year and to receive twenty lashes. The reason for passing such a severe sentence was, that the prisoner had been convicted twice before. We have perused the records of the two former cases. In the first the prisoner was convicted of abetment of theft, and in the second he was convicted of offences under ss. 457 and 380 of the Penal Code. If a person having been previously convicted of an offence specified in s. 2 of the Whipping Act shall again be convicted of the *same offence*, he may, under s. 3 of the Act, be punished with whipping in addition to any other punishment. The conviction for abetment may be left out of consideration, for it is not one of the offences referred to in s. 2. The second conviction was for offences under ss. 380 *or* 411. It is impossible to hold that the prisoner has committed the *same offence* in both cases. The sentence of whipping, in addition to rigorous imprisonment, was improper, and is hereby quashed. We may observe that the sentence of whipping which was passed in the second case was also improper, because the first conviction of the prisoner was not for the offence of lurking house-trespass or theft, but for abetment of theft. The sentence of one year's rigorous imprisonment is severe enough, and we do not wish to make it more severe by making the prisoner undergo solitary confinement for two months. We reduce the period of solitary confinement to one month.

Conviction affirmed. Sentence reduced.

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1895 Dec. 20.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

AVALA KONDA (ACCUSED) *v.* THE GOVERNMENT.*

Murder — Confession— Withdrawal—Corroborative evidence—Conviction on confession alone.

Conviction upon a withdrawn confession is not illegal. The use to be made of such confessions is matter of prudence rather than of law. In the absence of evidence of tutoring or ill-usage on the part of the Police and there being reliable circumstances indicating the truth of the confession, it should be acted on. The ruling of the Bombay High Court in *Queen-Empress* v. *Gharya* (I. L. R. 19 Bom., 728) preferred to those of the Madras High Court which held that a retracted confession must be supported by independent reliable evidence corroborating the confession in material particulars.

The Judgment of the Chief Court (BEST, *C. J.* and MEENACSHAYA, *J.*) was as follows:—

The appellant Avala Konda, a youth of about fourteen years of age has been convicted of murder of his wife Lutchmi, a girl of twelve years and sentenced to transportation for life.

The medical testimony is to the effect that the wounded girl was brought to the hospital on the 12th June, where she remained till her death took place on the 19th idem. There were four wounds on the back of the neck two of which were superficial, one of the other two being about five inches long and two inches deep extending from one side to the other, this latter being a "gaping wound. All the fleshy part of the nape of the neck had been cut clean through. The direction of the wound was from below upwards. The other wound on the nape of the neck was also incised, and extended from the angle of the right lower jaw to a little behind the right lobe of the right ear. It was about half an inch long and gaping.

*Criminal Appeal No. 67 of 1895-96, against conviction and sentence by the Sessions Judge, Nundidroog Division, under s. 302 of the Indian Penal Code, in Kolar Sessions Case No. 1 of 1895-96.

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There was also a superficial incised wound in the *front* of the neck of about two and half inches long and skin deep. Also an oblique incised gaping wound on the index finger of the right hand about a quarter of an inch long.

The death of the girl was stated to be caused by affection of the brain due to the injuries above described, and "the incised wounds could have been produced by a sharp instrument like the chopper before the court."

The chopper in question was given up by the accused's father, and according to the statement made by the appellant on the 14th June it was with this chopper he wounded his wife. This confession was subsequently repeated by the appellant at the preliminary enquiry.

At the trial before the Sessions Court the appellant retracted these confessions and explained them by saying they were made at the instigation of the police.

The only witness who spoke to being an eye-witness of the wounding of the deceased by the appellant is the first witness for the prosecution, Kondee, and she has been disbelieved by the Judge for good reasons. There thus remain only the confessions made by the appellant and retracted at the trial, on which his conviction rests.

It has been contended on behalf of the appellant that these confessions were not free and voluntary and that not being corroborated by any independent legal evidence, the conviction based upon them is bad in law. It has, no doubt, been held by the Madras High Court that a retracted confession must

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be supported by independent reliable evidence corroborating it in material particulars. *Queen-Empress* v. *Rangi and another* (1) and *Queen-Empress* v. *Bharmappa*(2). But, as observed by the Judges of the Bombay High Court who decided the recent case of *Queen Empress* v. *Gharya*(3), there is no rule of law to the above effect. The use to be made of such confessions is matter of prudence rather than of law. In the present case there is every reason for believing that the retracted confessions are true. There is certainly no evidence of their being the result of tutoring or ill-usage on the part of the police. On the other hand there can be no doubt the statements made by the *deceased* on two occasions, that the wounds on her neck were caused by the falling of a chopper from the top of a grain receptacle on which cats were fighting are *not true*, as it is clear from the evidence of the medical witness that the wounds found by him on the deceased could not have been so caused, there being *several* wounds on the back of the neck, and *one also on the front* of the neck and another on the hand. Moreover the principal wound was a clean cut *from below upwards.*

With reference to these statements of the deceased it must be noticed that her mother is the sister of the appellant's father and there is every reason for believing that she made the statements at the instigation of her uncle and mother, by the latter of whom she was being nursed in the Hospital when she made the statement for the second time.

A noticeable circumstance in the present case is

(1) I. L. R. 10 Mad., 295. (2) I. L. R. 12 Mad., 123.
(3) I. L. R. 19 Bom., 728.

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the absence of blood on the spot where the wounding undoubtedly took place. The appellant has explained this by saying he told his aunts of what he had done, and they "removed the blood and washed the place." The aunts were examined and denied all knowledge of the matter; but the explanation given by the accused may be safely accepted as true.

A careful consideration of the evidence satisfies us that the injuries which resulted in the death of the girl Lutchmee, were in fact caused by the appellant, and that he has been rightly convicted of the offence of murder.

We dismiss this appeal.

Appeal dismissed.

Before Rajah Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

In the matter of ISMAIL KHAN (ACCUSED) *v.* THE GOVERNMENT.

Jan. 28.

Bangalore Hackney Carriage Regulation (I of 1887)—Horses in good condition—Carriage and harness in good repair and sound—Evidence.

A hackney-carriage driver was said to have driven his cart for hire with loose wheels and used harness which was unserviceable. There was no charge or regular accusation made; and no clear admission of guilt: the only papers on the proceedings being a statement of the accused and the judgment. *Held* that the expressions "loose wheels" and "unserviceable harness" were too general and in the absence of any specific evidence as to the particulars in which the wheels were quite unsound and the harness perfectly useless, endangering the safety of the passengers, so as to bring the case within the Rules under the Hackney Carriage Regulation, the conviction was illegal.

*Criminal Revision No. 71 of 1894-95, of conviction and sentence by the City Magistrate of Bangalore, in Criminal Case No. 223 of 1894-95.

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The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and KRISHNA MURTI, *J.*) was as follows:—

The City Magistrate has not tried this case with care.

The only papers we find in the proceedings are these:—

(1). Statement of the accused.

(2). Judgment of the Magistrate.

There appears to have been no complaint, and no witness was examined for the prosecution. The Magistrate was wrong in assuming that the prisoner pleaded guilty to the charge. There was no regular charge or accusation against the accused. There was no clear admission of guilt. It is said that accused drove his cart for hire with loose wheels and used harness which was unserviceable. Section 5 of Regulation I of 1887 (The Bangalore City Hackney Carriage Regulation, 1887) provides that "any person breaking any rule under this Regulation shall be punished with fine which may extend to fifty rupees." The Rules framed are those published with Notification No. 165, dated 16th December 1887. The Magistrate in his judgment refers to Rules 7 and 9. Rule 7 requires that "The horses to be used in licensed carriages shall be thoroughly broken to harness in good condition and fit for public use and free from sores." Rule 9 is to the effect that the carriages should be "kept in good repair and sound as to their springs, doors and windows." The expressions "loose wheels" and "unserviceable harness" are too general and in the absence of any specific evidence as to the particulars in which the wheels were "quite unsound," and the harness

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"perfectly useless", endangering the safety of the passengers, so as to bring the case within the Rules quoted, the conviction was illegal.

As there was no evidence of any kind to support the conviction we cannot uphold it. The conviction and sentence must be quashed and the fines, if recovered, refunded to the accused.

Conviction quashed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

In the matter of ERANA AND TWO OTHERS (ACCUSED) *v.* THE GOVERNMENT.*

Feb. 8.

Criminal Procedure Code (Act X of 1882) s. 42—Duty to aid Police—Demand of aid.

A duty is imposed on the public by s. 42 of the Criminal Procedure Code of aiding the Police only when aid is reasonably demanded. If there was no demand there could be no breach of duty and a conviction in such case was improper.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

We are of opinion that the first accused was wrongly convicted. The complainant deposed that all the accused persons had beaten him. The other prosecution witnesses contradicted this evidence, and deposed that the first accused was simply standing near the place. The Subordinate Magistrate believed those witnesses. Nevertheless, he convicted the accused for not rendering aid to the complainant under s. 42 of the Code of Criminal Procedure. The section imposes a duty to aid a constable, if aid is demanded. The complainant did not demand the first accused's aid and there was, therefore, no breach of duty.

* Criminal Revision No. 92 of 1894-95, of conviction and sentence by the Second-class Magistrate of Chickmagalur, in Criminal Case No. 89 of 1894, dated the 18th day of December 1894.

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This opinion will be communicated to the District Magistrate and the Subordinate Magistrate. We have not formally quashed the conviction, as we note that the period of imprisonment had expired before we called for the record.

No order.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

Feb. 8.

In the matter of JIBRA AND TWO OTHERS (ACCUSED) *v.* THE GOVERNMENT.*

Criminal Procedure Code (Act X of 1882) s. 560—Compensation to accused—Absence of evidence.

Compensatien to an accused under s. 560 of the Criminal Procedure Code can only be awarded when the Magistrate is satisfied the accusation was frivolous or vexatious. Where the complainant was absent and accused was acquitted for default of evidence it could not be inferred that such was the case.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

We agree with the District Magistrate in holding that the order awarding compensation was illegal. Owing to the absence of the complainant, the accused was acquitted, but to justify an award of compensation, under s. 560 of the Criminal Procedure Code, to the accused, the Magistrate must be satisfied that the accusation was frivolous or vexatious. In the absence of any evidence it could not be inferred that such was the case.

We set aside the Amildar-Magistrate's order and direct the refund to complainant of the amount if recovered.

Order set aside. Refund ordered.

* Criminal Revision No. 90 of 1894-95, on reference by the District Magistrate of Bangalore, of order of the Second-class Magistrate of Bangalore, in Criminal Case No. 32 of 1894-95.

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Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge. 1895 *Feb. 15.*

In the matter of YAMANA (ACCUSED) *v.* THE GOVERNMENT.*

Penal Code (Act XLV of 1860) ss. 240, 241—Counterfeit coin—Guilty knowledge.

Where the accused passed coin with the knowledge that it was counterfeit, but there was nothing to shew he had such knowledge when he became possessed of it, he should be convicted under s. 241 of the Penal Code.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.*, and RAMACHENDRA IYER, *J.*) was as follows:—

The accused delivered a counterfeit coin with the knowledge that it was counterfeit. There is nothing to show and the Magistrate does not find that he knew it was counterfeit when he became possessed of the coin. That being so, the conviction ought to be under s. 241 of the Penal Code, and not under s. 240. The conviction is altered accordingly, and the sentence is allowed to stand.

Conviction altered. Sentence confirmed.

In the matter of RAMAY GOWDA (ACCUSED) *v.* THE GOVERNMENT.† *March 8.*

Criminal Procedure Code (Act X of 1882) s. 488—Maintenance—Compromise—Powers of magistrate—Procedure.

A wife having sought an order for maintenance against her husband under s. 488 of the Criminal Procedure Code, entered into a compromise with him whereby he was (1) to pay her an annual allowance the first payment to be made on a future date, (2) to give her certain brass utensils and, (3) to provide her with a dwelling-house. *Held* that the Magistrate had no power to

* Criminal Revision No. 95 of 1894-95, of conviction and sentence by the Railway District Magistrate of Kadur, in Criminal Case No. 10 of 1894-95, dated the 28th day of February 1894-95.

† Criminal Revision No. 99 of 1894-95, of the proceedings held by the General Assistant Commissioner and First-class Magistrate of Tumkur in Criminal Miscellaneous Case No. 31 of 1894-95.

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compel a husband to give his wife kitchen or other utensils or to provide her with a dwelling house and in making an order to that effect he usurped the functions of a civil court. *Also, quære,* whether he could make an order for an annual allowance to commence from a future date as the section only empowers a criminal court to order a person "to make a monthly allowance" and that "payable from the date of the order". The proper procedure in case of such a compromise would be for the compromise to be recorded, though it could not be enforced, and to dismiss the wife's petition unless an agreement were entered into that might be enforced by a criminal court.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

A wife applied, under s. 488 of the Code of Criminal Procedure, for an order compelling her husband to make an allowance of Rs. 25 a month for her maintenance. The parties entered into a compromise which was to the effect that the husband should pay her Rs. 47 per annum, that he should deliver to her certain brass utensils, that he should pay Rs. 100 to enable her to buy a house, in which she should possess a life-interest only, and that until the house was purchased she should live with her brother. The Magistrate accepted the compromise and made an order according to its terms.

Section 488 empowers a criminal court to order a person "to make a monthly allowance" and it enacts that "such allowance shall be payable from the date of the order." The agreement provided for an annual payment, and the first payment was not to become due until after the lapse of a few weeks from the date thereof. The legality of the order which has embodied these two provisions of the compromise is questionable.

There can, however, be no question that the remainder of the order is illegal. A Magistrate has

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no power to compel a husband to deliver kitchen and other utensils to his wife and to provide her with a dwelling-house; and an order made to that effect cannot be enforced. The Magistrate has assumed the functions of a civil court.

The order is not sustainable and is hereby quashed. The case will be remitted to the Magistrate with instructionts to send for the parties and to inform them that the compromise will be simply recorded and cannot be enforced. If they do not enter into a fresh agreement which may be enforced by a criminal court, the wife's petition will be dismissed.

Order quashed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and C. Meenacshaya, Judge.

In the matter of PEER SAB (ACCUSED) *v.* THE GOVERNMENT.* *March 28.*

Penal Code (Act XLV of 1860) s. 279—Rash or negligent driving—Onus of proving negligence,

Where a boy sitting with out-stretched legs in a public high-way was injured by a carriage driving over his leg, but it was admitted the carriage was driven at a moderate speed and the boy could, had he chosen, have drawn up his legs or moved out of the way. *Held*, that the burden of proving negligence rested on the prosecution and none having been shown on the part of the accused, his conviction was illegal.

The Order of the Chief Court (THUMBOO CHETTY, *C.J.* and MEENACSHAYA, *J.*) was as follows:—

We are of opinion that the conviction in this case ought not to be sustained. The accused, a coachman, was tried and convicted under s. 279 of the Indian Penal Code and sentenced to a fine of Rs. 12. The facts of the case are that the accused was returning

* Criminal Revision No. 101 of 1894-95, against conviction and sentence by the City Magistrate of Mysore, in Criminal Case No. 209 of 1894-95.

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from Srirungapatam to Mysore driving his coach and the second witness for the prosecution, a lad of about twelve years of age, who was sitting on the public road with his legs stretched out, had his left leg injured by one of the wheels passing over it: this took place at about 8 P. M. on the 24th December last. It nowhere appears from the records that the coach was being driven furiously or at a speed inconsistent with the safety of the public: on the contrary, the injured boy himself states that the coach came at the ordinary speed, or rather at a moderate speed. He further says that he saw the coming of the coach from a distance of about twenty-five yards from where he was seated, and yet he did not pull back his legs or move himself out of the way. The burden of proving negligence rested on the prosecution, and no negligence has been shown on the part of the accused. We quash the conviction and direct the refund of the fine, if recovered.

Conviction quashed. Fine refunded.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and C. Meenacshaya, Judge.

April 3.

In the matter of DEVE GOWDA ALIAS KALE GOWDA (ACCUSED) *v.* THE GOVERNMENT.*

Registration Act (III of 1877, *s.* 82 (*c*)—*Penal Code* (*Act XLV of* 1860) *s.* 205—*False personation.*

A son who personated his father for the purpose of registering a document executed by the latter who was very old and ill and sent him to present the document, *held* rightly convicted under s. 82 (c) of the Registration Act (III of 1877) he having stated he was the executant of the document and endorsed the document to that effect.

* Criminal Revision No. 113 of 1894-95, of order by Mr. K. S. Chandrasekaraiyar, First-class Magistrate of Hassan, in Criminal Case No. 44/3 of 1894-95, dated the 26th day of January 1895.

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The Order of the Chief Court (THUMBOO CHETTY, *C.J.*, and MEENACSHAYA, *J.*) was as follows:—

In this case the accused was convicted by the First-class Magistrate of Hassan, under s. 205 of the Indian Penal Code and s. 82 (c) of the Registration Act (III of 1877). The father of the accused one Deve Gowda, executed a deed of sale and, being very old and ill, sent his son, the accused, to present the document for registration to the Sub-Registrar of Hole Narasipur. In presenting the document for registration, the accused stated that he was the executant of the document, saying "Deve Gowda and I signed a statement to that effect on the document."

The offence comes under s. 82 (c) of the Registration Act. The Magistrate was wrong in considering that s. 205 of the Indian Penal Code also applied to the case. That section provides against false personation for the purpose of any act or proceeding *in any suit* or *criminal prosecution* and is not applicable to the circumstances of the present case. We do not wish, however, to interfere with the sentence passed as the accused was rightly convicted under the Registration Act. With these remarks, the records will be returned.

Conviction and sentence confirmed.

Before A. Ramachandra Iyer and C. Meenacshaya, Judges.

In the matter of VENKATASIA (ACCUSED) *v.* THE GOVERNMENT.* — *June 17.*

Penal Code (Act XLV of 1860) s. 193—False Evidence—Sanction—Criminal Procedure Code (Act X of 1882) s. 195—Notice.

Previous notice to a person charged with false evidence is not necessary before granting sanction to prosecute, though in some

* Criminal Revision No. 148 of 1894-95, on reference by the District Magistrate of Kolar, of order of Mr. K. S. Dorasami Iyer, First-class Magistrate of Kolar, in Criminal Cases Nos. 14 and 15 of 1894-95 dated the 31st day of October 1894.

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cases it may be desirable. Further, an order of sanction loosely worded and that does not specify the court and the occasion on which the offence was committed, does not fulfil the requirements of section 195 (fourth paragraph) of the Criminal Procedure Code.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The General Assistant Commissioner of Kolar has sanctioned the prosecution of one Venkatasia for having given false evidence before him in a judicial proceeding. The District Magistrate of Kolar has reported the case for orders on the ground that the sanction was given behind the back of the person affected by it and that he ought to have had an opportunity of being heard.

It is nowhere laid down in the Code of Criminal Procedure that a Magistrate has no power to sanction the prosecution of an individual for an offence under s. 193 of the Penal Code without giving previous notice to that individual. As the Code does not enact that an order for prosecution made *ex parte* shall be treated as a nullity, we see no reason to rescind the Magistrate's order. It may be desirable, nay, necessary, in certain cases to hear a person before sanction is given to prosecute him. If, for instance, a complaint has been struck off upon receipt of a police officer's report, and if an application is made for sanction to prosecute the complainant for preferring a false complaint, he ought to be heard before an order is made against him. The case before us is not one of that kind. The Magistrate recorded the evidence of Venkatasia in both cases and expressed his opinion in his judgment that the witness had given false evidence and that the law must be set in motion against him. This is not a case in which we

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should hold on grounds of natural justice that previous notice to the witness was necessary. 1895

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The order does not fulfil the requirements of the fourth paragraph of s. 195 of the Criminal Procedure Code (Act X of 1882). It is loosely worded and it does not specify the court and the occasion on which the offence was committed. With these remarks, the record will be returned to the District Magistrate.

Record returned with remarks.

Before A. Ramachendra Iyer and O. Meenacshaya, Judges.

In the matter of SANAMALIA (ACCUSED) *v.* THE GOVERNMENT.* *June 20.*

Excise Regulation s. 38—Cultivation of hemp plants—Presumption.

Where two hemp plants were found growing in the accused's garden but there was no evidence to rebut the plea of the accused that they grew spontaneously. *Held* that under the Excise Regulation *s.* 38 no conviction could be had in the absence of any evidence, direct or inferential, that the accused cultivated the plants, and the Magistrate was wrong in presuming they had been raised by cultivation.

The Order of the Chief Court (RAMACHENDRA IYER, and MEENACSHAYA. *JJ.*) was as follows :—

The accused was convicted by the Amildar-Magistrate of Chellakere under s. 38 of the Excise Regulation and sentenced to a fine of four annas. Two hemp plants were discovered in his garden, and the Magistrate presumed that they had been raised by cultivation. The District Magistrate being of opinion that the conviction was illegal, has submitted the record under s. 438 of the Criminal Procedure Code. We think that the conviction should be set aside. No evidence was offered by the prosecution to rebut

* Criminal Revision No. 134 of 1894-95, on reference by the District Magistrate of Chitaldroog, of order of the Third-class Magistrate of Chellakere, in Criminal Case No. 50 of 1894-95.

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the plea of the accused that the plants grew spontaneously. In the absence of any evidence, direct or inferential, that the accused cultivated the plants, no conviction could be had under this section. We quash the conviction and direct the refund of the fine, if levied.

Conviction quashed.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of MUDLI (ACCUSED) *v.* THE GOVERNMEMT.*

June 24.

Criminal Procedure Code (Act X of 1882) ss. 331, 519, 545—*Compensation to witness—Power of Magistrate in awarding imprisonment in default.*

If money is taken out of the possession of a priscner at the time of his arrest, compensation may be paid thereout to an innocent purchaser under sec. 519 of the Criminal Procedure Code; but there is no authority for and sec. 545 of the Code does not authorise payment of, compensation out of fine to a witness in the case.

Also: a Magistrate who has power to award six months imprisonment for an offence cannot award more than one-fourth of that period or one and a half month's imprisonment in default of payment of fine.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows :—

The prisoner was convicted of house-breaking and theft, and sentenced to two months' rigorous imprisonment, and to pay a fine of Rs. 20 ; in default, to suffer additional imprisonment for two months. If the fine was paid, Rs. 3 was ordered to be paid to a witness to whom the prisoner had pledged a stolen jewel.

Compensation might have been given to the witness if money was taken out of the prisoner's possession at the time of the arrest under s. 519 of the Criminal Procedure Code. Section 545 of the Code does not authorise payment of compensation out of

* Criminal Revision No. 155 of 1894-95, on reference by the District Magistrate of Chitaldroog, of order of the Second-class Magistrate of Chitaldroog, in Criminal Case No. 84 of 1894-95.

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fine to a witness in the case. The order is set aside. 1895

The Magistrate who has power to award six months' imprisonment as punishment for the offence ought not to have awarded more than one-fourth of the period or one and a half month's imprisonment, in default to payment of the fine (s. 33). Theorder of the Magistrate is modified accordingly for compensation.

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Order set aside. Sentence modified.

July 15.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of RUDRIA AND TWO OTHERS (ACCUSED) *v.* THE GOVERNMENT.*

Penal Code (Act XLV of 1860) s. 174—Criminal Procedure Code (Act X of 1882) s. 487—Trial by Magistrate of offence committed in contempt of his authority as Revenue Officer.

Where a Magistrate tried persons under s. 174 of the Penal Code for failing to obey a summons issued by him in his capacity as Revenue Officer, *Held,* that the trials were illegal as he was prohibited by s. 487 of the Criminal Procedure Code from entertaining cases of contempt of his authority.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The Magistrate in his capacity as a Revenue Officer, issued a summons to the accused to attend at his office. They failed to appear. Thereupon, in his magisterial capacity, he issued summons for an offence under s. 174 of the Penal Code, and convicted them. The Revenue Officer was the complainant; the offence was committed in contempt of his authority. He was prohibited from trying such cases by s. 487 of the Code of Criminal Procedure. We quash the sentence and direct that the fines, if levied, be refunded.

Sentences quashed.

* Criminal Revision No. 149 of 1894-95, on reference by the District Magistrate of Bangalore, of order of the Third-class Magistrate of Closepett Sub-Taluk, in Criminal Case No. 106 of 1894-95.

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1895 July 17.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of PUTA (ACCUSED) *v.* THE GOVERNMENT.*

Theft of fish—Property—Evidence.

A person cannot be convicted of theft of fish from a tank, merely because the Municipality had exhibited a notice prohibiting people from fishing therein. There being nothing to show that the fish in the tank was in the possession of the Municipality who had instituted the prosecution, there could be no dishonest removal of property "out of the possession of any person without that person's consent."

The Orders of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) were as follows:—

MEENACSHAYA, *J.*—I am of opinion that the conviction in this case is illegal. The accused was convicted of theft of fish which he had caught in the Karanjee tank, Mysore. The offence of theft consists in the dishonest removal of property "out of the possession of any person without that person's consent," and it cannot be said that the fish in the tank was in the possession of the Municipality, at whose instance the prosecution appears to have been instituted. The fish were not specially reared and preserved in the tank nor was the tank so enclosed as to prevent the fish from leaving it when it overflowed during the monsoon. I would quash the conviction. I am supported in this view by the case of *The Queen* v. *Revu Pothedu* (1).

RAMACHENDRA IYER, *J.*—There was no evidence in the case except that the Municipality had exhibited a notice prohibiting people from catching fish in the tank. This fact alone was not sufficient evidence to

* Criminal Revision No. 150 of 1894-95, of conviction and sentence of the City Magistrate of Mysore, in Criminal Case No. 340 of 1894-95.

(1) I. L. R. 5 Mad., 390.

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prove that the fish in the tank belonged to the Municipality and was in their possession. The sentence having been executed, it is sufficient to point out the error to the Magistrate.

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PUTA v. GOVERNMENT.

Conviction quashed.

Before A. Ramachendra Iyer and C. Meenachaya, Judges.

In the matter of NANJUNDAPA (COUNTER-PETITIONER) *v.* THE GOVERNMENT.*

Oct. 28.

Penal Code (Act XLV of 1860) *s.* 504—*Insult—Summons Case—Criminal Procedure Code (Act X of* 1882) *s.* 250—*Compensation—Evidence.*

An offence under s. 504 of the Penal Code (Insult) is not triable as a summons case and therefore a Magistrate had no power to award compensation, under s. 250 of the Criminal Procedure Code.

In making an award of compensation, a Magistrate is required to find as a fact, on evidence, that the complaint was vexatious or frivolous. Where he has recorded no evidence but acted merely on surmise his order is illegal.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

An offence under s. 504 of the Penal Code is not triable as a summons case and the Magistrate had no power to award compensation.

When a Magistrate has power to award compensation, the law expects him to find upon the evidence before him that a complaint has been made vexatiously. The Magistrate did not record evidence and he acted upon bare surmise.

We quash the order and direct that the money, if levied, be refunded to the complainant.

Order quashed.

*Criminal Revision No. 42 of 1895-96, of order of the District Magistrate of Kolar, in Criminal Revision Petition No. 13 of 1895-96.

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Nov. 27.

Before J. W. Best, Chief Judge and A. Ramachendra Iyer, Judge.

In the matter of ABDUL KHADUR SAB AND SIX OTHERS (ACCUSED) *v.* THE GOVERNMENT.*

Criminal Procedure Code (Act X of 1882) *ss.* 203 *and* 204—*Dismissal of complaint—Acquittal.*

Where a Magistrate having issued summons under s. 204 of the Criminal Procedure Code, examined only the complainant and the accused and, without examining the remaining witnesses for the prosecution, acquitted the accused and dismissed the complaint. *Held*, that, having taken cognizance of the offence under s. 204 of the Criminal Procedure Code, the Magistrate had no power to dismiss the complaint under s. 203 of the Code. *Also*, that the order of acquittal was wrong, as he did not examine the complainant's witnesses.

The Order of the Chief Court (BEST, *C.J.* and RAMACHENDRA IYER, *J.*) was as follows:—

The Subordinate Magistrate took cognizance of the complaint, and issued summons for the attendance of six accused persons. On the day fixed for trial, the first accused alone was present. The Magistrate examined the complainant and the accused and, without examining the remaining witnesses for the prosecution, acquitted the first accused and dismissed the complaint against the other accused persons, under s. 203 of the Code of Criminal Procedure.

The Magistrate having taken cognizance of the offence and issued summons under s. 204 of the Code had no power to dismiss the complaint under s. 203. The order of acquittal also was wrong, inasmuch as he did not examine the complainant's witnesses. We quash the order, and direct the Magistrate to restore the complaint to his file, and dispose of it according to law.

Order quashed. Case remanded.

* Criminal Revision No. 51 of 1895-96, on reference by the District Magistrate of Mysore, of order of the Second-class Magistrate of T. Narsipur Taluk, in Criminal Case No. 111 of 1894-95.

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Before J. W. Best, Chief Judge and C. Meenacshaya, Judge. 1895 Dec. 12.

In the matter of RAYAPA KAMATHI (ACCUSED) *v.* THE GOVERNMENT.*

Criminal Procedure Code (Act X of 1882) ss. 247 and 403—Effect of acquittal.

An order under s. 247 of the Criminal Procedure Code is one of acquittal and the person so acquitted cannot, by s. 403 of the same Code, be again prosecuted or retried for the same offence.

The Order of the Chief Court (BEST, *C.J.* and MEENACSHAYA, *J.*) was as follows:—

An order passed under s. 247 of the Criminal Procedure Code is one of acquittal, and so long as such order remains in force, the person acquitted cannot be prosecuted, nor can proceedings be taken against him under the Code with a view to his trial for the same offence. *See* Criminal Procedure Code, s. 403.

The Amildar-Magistrate's order is right and cannot be disturbed.

The record will be returned to the District Magistrate with the above remarks.

Order upheld.

Before J. W. Best, Chief Judge and C. Meenacshaya, Judge.

In the matter of ABDUL GANI (ACCUSED) *v.* THE GOVERNMENT.† Dec. 20.

Artificers' Act (XIII of 1859)—Order for imprisonment in default—Giving time for repayment—Materiality.

Where a Magistrate, under the Artificers' Act (XIII of 1859), directed the balance of advance found due by the accused to be paid forthwith and ordered that in default of payment imprisonment should be undergone for three months or until the amount be sooner

* Criminal Revision No. 48 of 1895-96, on reference by the District Magistrate of Kadur, of order of the Second-class Magistrate of Mudgere Taluk, in Criminal Miscellaneous Case No. 73 of 1895-96.

† Criminal Revision No. 49 of 1895-96, of proceedings of the Second-class Magistrate of Tarikere, in Criminal Miscellaneous Case No. 948 of 1894-95.

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paid, *Held*, that the order directing imprisonment in anticipation of the money not being paid was irregular; but that there is nothing requiring time to be given when the order is for payment of money. *Further*, an order directing the money to be paid forthwith is not contrary to law. *Also*, as it was not pretended that the accused was prepared to pay the money, the irregularity in passing the anticipatory order for imprisonment was not material and should be enforced if payment had not been made.

The Order of the Chief Court (BEST, *C.J.* and MEENACSHAYA, *J.*) was as follows:—

The Amildar-Magistrate's order passed under s. 2 of the Artificers' Act (XIII of 1859) has been referred as illegal, in that it directs the balance of advance found due from the accused to be paid "forthwith" and further orders that in default of payment of the money, the accused do suffer rigorous imprisonment for three months, or until the amount be sooner paid. The District Magistrate is of opinion that the accused should have been given some specified time in which to pay the amount and that the order is wrong in awarding sentence of imprisonment in anticipation of failure to make payment as directed.

Section 2 contemplates, no doubt, first an order to repay the money (or do the work) and a *subsequent* order for imprisonment in case of the first order not being obeyed. The Amildar-Magistrate's order directing imprisonment, *in anticipation* of the money not being repaid was therefore irregular. But there is nothing in the section requiring *time to be given* when the order is for repayment of the money; and on referring to s. 3 it is seen that it is only in case of the order being for the work to be performed, the Magistrate is authorised to take security.

It is therefore impossible to say that the order,

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directing the money to be repaid forthwith, is contrary to law; and as it is not pretended that the accused was prepared to pay the money, the irregularity in passing the anticipatory order for imprisonment cannot be held to have been material.

If the money has not been repaid, even now there is no reason why the order for imprisonment should not be given effect to.

The record will be returned to the District Magistrate with the above observations.

If the money has not been repaid as directed, so much of the order of the Amildar-Magistrate as directs imprisonment of the accused must be enforced.

Order upheld.

Dec. 21.

In the matter of RAMACHENDRIA AND THREE OTHERS *v.* THE GOVERNMENT.*

Mysore Marriage Regulation (X *of* 1894) *s.* 2—*Officiating priest—ment—Facilitating commission of offence—Penal Code* (*Act XLV of* 1860) *s.* 107, *Expl.* 2.

If a person present and officiating as priest at the marriage of an infant girl prohibited by the Mysore Marriage Regulation had reason to believe that she was an infant within the definition of s. 2 of the Regulation, he facilitated the commission of the offence and was guilty of abetment under Expl. 2 of s. 107 of the Indian Penal Code.

The Order of the Chief Court was as follows :—

The investigation was defective. The record does not show why no evidence was adduced for the prosecution to prove what was done by the third accused. If the latter was the priest who officiated at the marriage ceremony, and if he had reason to think that the bride was an infant girl within the definition of s. 2 of the Marriage Regulation (No. X of 1894), he

* Criminal Revision No. 62 of 1895-96, of Criminal Case No. 5 of 1895-96, on the file of the District Magistrate of Tumkur, dated the 2nd day of December 1895.

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facilitated the commission of an offence and he was guilty of abetment under Explanation 2 to s. 107 of the Penal Code. These remarks are made for the guidance of the Magistrate in similar cases. No action can be taken in this case since the accused has been acquitted. It is understood that the Magistrate has not made an order of acquittal in regard to the fourth accused.

Record returned with remarks.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti Judges.

In the matter of AÑAYA (ACCUSED) *v.* THE GOVERNMENT.*

Feb. 6.

Criminal Procedure Code (Act X of 1882) s. 488—Maintenance—Refusal by husband to maintain wife—Frivolous excuse by husband.

B left *A* her husband's house, with his permission tc visit her mother who was ill: and she subsequently filed a complaint before the Magistrate that when she requested *A* to take her back to his house, he refused to do so calling her a thief and threatening to beat her, and therefore she sought maintenance under s. 488 of the Criminal Procedure Code. Before the Magistrate, *A* answered that he was willing to take *B* back if his caste people all consented to it. *Held* by the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) that such a conditional offer was on the face of it a mere frivolous excuse, and tantamount to a refusal by *A* to maintain his wife especially in the face of the Magistrate's finding that the accusations made by *A* against *B* were wholly without foundation. The award of maintenance by the Magistrate was therefore a very proper and legal one.

Per RAMACHENDRA IYER J.—*B* did not allege that *A* had driven her away from his house, and that she was compelled to live separately from him. When she was voluntarily living away from *A* he was not bound to give her separate maintenance. She did not offer to return to *A* and he did not refuse to maintain her, so there was neither neglect nor refusal. There was no foundation for her application; and she was not entitled to relief because *A* did not prove that she was disentitled to separate maintenance.

*Criminal Revision Petition No. 102 of 1894-95, of ordr of the City Magistrate of Bangalore, in Criminal Miscellaneous Case No. 20 of 1894-95.

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Mr. *S. R. Master* for the petitioner.

The Orders of the Chief Court (THUMBOO CHETTY, *C.J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) were as follows:—

RAMACHENDRA IYER, *J.*—I think that the magistrate's order was not right. Section 488 of the Code of Criminal Procedure enables a magistrate to award separate maintenance to a woman whose husband has "neglected or refused to maintain" her. The words "neglected or refused to maintain" mean that the husband has not discharged the duty of maintaining the wife. It seems to me that a duty and a breach of that duty must be proved, before a wife can claim separate maintenance.

In this case, the wife left her husband eight or nine months before the date of the application and lived with her brothers. She did not allege that the husband had driven her away from his home and that she had been compelled to live separately from him. While she was voluntarily living away from the husband, he was not bound to give her separate maintenance. She did not offer to return to her husband and he did not refuse to maintain her, so that when she filed the application there had been neither neglect nor refusal.

When there was no foundation for the application, I think we ought not to give her relief, because the defendant did not prove that she was disentitled to separate maintenance. I think the petition ought to be dismissed. If she goes back to her husband, and if he turns her out or refuses to admit her into his house, she may renew her application.

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KRISHNA MURTI, *J.*—There seems to be no ground for interference in this case. A previous demand before a complaint under this chapter is filed is nowhere laid down. The husband is certainly entitled to be relieved of the obligation to maintain the wife separately, if he has no objection to her living with him. But from the plea of the accused in the court which the magistrate has found to be futile and false, it is obvious that he refused to take the wife back except with the consent of the caste people. He adduced no evidence to prove the existence of any such impediment in his way and as the charge of adultery has been found against him, the only condition under which he could have escaped liability under s. 488 does not exist. The order under the circumstances seems correct and this application must be rejected.

THUMBOO CHETTY, *C.J.*—The words of s. 488 of the Code of Criminal Procedure are, that "if any person having sufficient means, neglects or refuses to maintain his wife, the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife." In this case, the Magistrate, after weighing the evidence offered on both sides, has found that the allegation of the accused, that the complainant ran away from the house of the former and has been leading an immoral life, was wholly without foundation; but that it was satisfactorily established, by the evidence of complainant and her witnesses, that she had been living in the house of her mother having gone thither with her husband's permission during last Sivaratri to see her mother who was ill, and that, about four months ago, when the accused attended a marriage in her

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brother's house, she requested the accused to take her back to his house, but that he refused to do so, calling her a thief and threatening to beat her. The accused when questioned by the Magistrate to know if he was now willing to take his wife back, replied "I shall take her back if the caste people all will consent to it." It is thus evident, that the accused was not prepared to at once take his wife back to his house, and that his permitting her to return to his house would depend upon the will and pleasure of his caste people. Whether the accused had taken steps to ascertain the wishes of his caste people, and why their consent was at all necessary to the restitution of conjugal rights between husband and wife has not been explained or elicited in the evidence offered by the accused. The attempt made to prove that the complainant ran away or eloped with a washerman, signally failed; and, in the absence of any sufficient excuse for the accused refusing to permit his wife to return to his house or to take her back, it must be presumed that the accused, and not the complainant, is in fault. There is admittedly no inability or refusal on the part of the wife to live with her husband. It is the latter who pleads that he cannot take her back without the consent of his caste people. This is a frivolous excuse which cannot be admitted. The accused's plea is tantamount to a refusal on his part to maintain the wife. He has been actually called upon and requested by the wife to take her or remove her to his house, and as he has failed to do so the case fell within the meaning of s. 488 of the Code of Criminal Procedure, and the award of maintenance was a very proper and legal award. I do not think this is a fit case for the

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exercise of the revisional powers of this Court. I would reject this application.

Application rejected.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

March 20.

GOVINDA GOWDA AND OTHERS (PETITIONERS) v. NANJUNDIA (COUNTER-PETITIONER.)*

AND

THIRUMALA GOWDA AND OTHERS (PETITIONERS) v. LINGANA (COUNTER-PETITIONER.)*

Criminal Procedure Code (Act X of 1882), s. 522—Restoration of immoveable property.

To support an order under s. 522 of the Criminal Procedure Code, a finding that criminal force was used is necessary; and if dispossession did not result from criminal force, the section has no application.

The order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, JJ.) was as follows:—

We admitted the applications for revision and called for the record in order to examine the legality of the order which had been passed by the Subordinate Magistrate, directing the accused to deliver possession of the land to the complainant. Section 522 of the Code of Criminal Procedure empowers a Magistrate to order restoration of possession if a person "is convicted of an offence attended by criminal force."† To support an order under this section it is obvious that

*Criminal Revision Petitions Nos. 136 and 137 of 1894-95, of the orders of Mr. Venkatavaradan Iyengar, District Magistrate of Tumkur, in Criminal Appeals Nos. 21 and 22 of 1894-95, dated the 31st day of October 1894.

†Act X of 1882, s. 522—Whenever a person is convicted of an offence attended by criminal force, and it appears to the court, that by such force any person has been dispossessed of any immoveable property, the court may if it thinks fit order such person to be restored to the possession of the same.

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a finding of use of criminal force is necessary, and that if dispossession did not result from criminal force, the section has no application. This aspect of the question does not seem to have suggested itself to the Subordinate Magistrate or to the District Magistrate; and there is no finding that the accused had used criminal force. The order is *primâ facie* wrong and cannot be supported. The complainant's advocate has contended before us that the order passed by the Subordinate Magistrate was wrong, that it was not needed and that as a matter of fact his client had not been dispossessed. As the point has not been discussed by the District Magistrate, we are compelled to send the case back for reconsideration. It being necessary to examine the whole evidence to determine the circumstances under which the offence was alleged to have been committed, we consider it just in the interests of both parties to quash the District Magistrate's judgments and to direct that the appeals be restored to his file and disposed off in due course of law.

Proceedings quashed. Appeals to be reheard.

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of THE GOVERNMENT *v.* IRAPA (ACCUSED NO. 2).*

June 17.

Criminal Procedure Code (Act X of 1882*) s.* 518 *and s.* 520*—Restitution of property—Power of appellate court to order restitution of property handed over by subordinate court—Duty of subordinate court to stay its hand pending time of appeal—Appeal from order regarding disposal of property—Powers and duties of criminal courts regarding disposal of property.*

If the interference of a court of criminal appeal is needed to protect a person entitled to possession of property it must be in-

* Criminal Revision No. 84 of 1894-95, of the order of the District Magistrate of Shimoga, in Criminal Appeal No. 21 of 1893-94.

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voked before the property has passed out of the control of the court below. The order which may be passed under s. 520 of the Criminal Procedure Code is one which may modify, alter or annul an order regarding the disposal of property and there is no power to order restitution. A claimant aggrieved by the order of a subordinate magistrate may maintain an action for the property or for damages.

Section 518 requires the courts in appealable cases to suspend the execution of any order as to possession until the period for presenting such appeal has passed : and mischievous consequences may ensue if they act in a precipitate way in disregard of the provisions of the section, especially as there may be no appeal from a conviction but yet an appeal may be brought from an order passed by a judge regarding the disposal of property.

Further—A criminal court has no power to pass an order respecting the disposal of property unless it finds that an offence appears to have been committed regarding it, or that it has been used for the commission of an offence. When the court arrives at neither of these findings, the property should ordinarily be delivered to the person by whom it has been produced ; and where it has been produced by the police, it should ordinarily be returned by the police to the person out of whose possession they have taken it. If, however, there exists a *bonâ fide* doubt as to the ownership and a person other than the person from whose possession the property is taken makes a claim for it, a magistrate may impose conditions on the person to whom it is delivered in order that it or the value of it may be forthcoming in case the rival claimant establishes a title to it.

The Order of the Chief Court (RAMACHENDRA IYER and MEENACSHAYA, *JJ.*) was as follows:—

The petitioner was convicted of theft, and the property which was alleged to have been stolen was ordered to be delivered to the possession of the complainant. The petitioner appealed against the conviction to the District Magistrate, who quashed it and also the order regarding the delivery of the property to the complainant. When the petitioner applied to the Subordinate Magistrate for restoration of the property it was found that it had been inadvertently delivered to the complainant before an appeal was made from

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the conviction. Thereupon the District Magistrate passed another order, declaring his inability to order restitution. The petitioner contends that the District Magistrate had power to direct the complainant to deliver up the property and prays the court to pass such an order in the exercise of its powers as a Court of Revision.

As this was an appealable case, the Subordinate Magistrate was wrong in carrying out his order at once. He has, no doubt, committed an error; and the question for determination is, whether we have power to undo the mischief which has been done.

Section 520 of the Code of Criminal Procedure enacts that "any court of appeal, confirmation, reference or revision, may direct any order under ss. 517, 518 or 519, passed by a court subordinate thereto, *to be stayed pending consideration* by the former court; and may modify, alter, or annul such order." An order passed under either of the ss. 517, 518 or 519 could not be stayed after it had been carried into effect. The power, which is conferred by the section upon a court of appeal or revision to stay the order pending consideration, shows that if its interference is needed to protect a person who is entitled to possession it must be invoked before the property has passed out of the control of the court below. It is worthy of note that the order which may be passed under s. 520 is one which may modify, alter, or annul an order regarding the disposal of property and that there is no power to order restitution.

The cases which are reported in the Indian Law Reports confirm this opinion. In *In re Annapurnabai*(1)

(1) I. L. R. 1 Bom., 630.

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the Judges found that the petitioner before them was entitled to the property and regretted their inability "to afford any adequate remedy for the wrong done her," the property having been delivered by order of the District Magistrate before the question was determined by the High Court. This ruling has been followed in *Queen-Empress* v. *Abhram Umar* (1) and *Basudeb Surma Gossain* v. *Nazeruddin*(2). The case of *In re Ratanlal Rangildas*(3) is not opposed to these cases. The point which the court discussed was, whether, under the circumstances stated in the judgment, the Magistrate ought to have passed an order under s. 517 of the Code or under s. 523. The court did not in terms order restitution and the report does not show that the property was not within the court's control when the Magistrate's order was annulled.

An order passed under s. 517 of the Code concludes the immediate right to possession—*Queen-Empress* v. *Tribhovan Manekchand*(4). It does not profess to be an adjudication which is conclusive between the parties. The petitioner who is aggrieved by the order of the Subordinate Magistrate may maintain an action for the property or for damages.

This is not the first time we have been compelled to refer a party to seek redress in a civil court although his right to immediate possession has been upheld by us or by a court of appeal. Judges of criminal courts have acted, on several occasions, contrary to the provisions of s. 518 which requires them in appealable cases to suspend the execution of the order

(1) I. L. R. 8 Bom., 575. (2) I. L. R. 14 Cal., 834.
(3) I. L. R. 17 Bom., 748. (4) I. L. R. 9 Bom., 134.

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"until the period for presenting such appeal has passed." We wish to impress upon them the mischievous consequences which may ensue if they act in such a precipitate way as to compel a court of appeal or revision to abstain from exercising the power which is conferred upon it by s. 520. With a view to make the provisions of the Code intelligible, we have stated below the substance of the decisions of the High Courts :—

(*a*) There may be no appeal from a conviction and yet an appeal may lie from an order passed by a judge regarding the disposal of property—*Empress* v. *Joggessur Mochi*(1) and *Queen-Empress* v. *Ahmed*(2).

(*b*) A Criminal Court has no power to pass an order respecting the disposal of property unless it finds that an offence appears to have been committed regarding it, or that it has been used for the commission of an offence. When the Court arrives at neither of these findings, the property *should ordinarily be delivered to the person* by whom it has been produced; and where it has been produced by the police, it should ordinarily be returned by the police to the person out of whose possession they have taken it. If, however, there exists a *bonâ fide* doubt as to the ownership, and a person other than the person from whose possession the property is taken makes a claim for it, a magistrate may impose conditions on the person to whom it is delivered in order that it or the value of it may be forthcoming in case the rival claimant establishes a title to it. (Weir, p. 1124).

No order.

(1) I. L. R. 3 Cal., 381. (2) I. L. R. 9 Mad., 448.

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1895 Dec. 20

Before A. Ramachendra Iyer and C. Meenacshaya, Judges.

In the matter of THE GOVERNMENT *v.* APANA (ACCUSED).*

Excise Regulation (III of 1885) *s.* 39 *and s.* 42—*Sale of toddy contrary to conditions of license—Conviction under wrong section—Evidence.*

Where a license-holder sold toddy at the foot of a tree contrary to one of the conditions of the license, the conviction should be under s. 42 of the Excise Regulation of an offence punishable by fine only; not under s. 39, the offence under which is punishable by imprisonment.

As, however, the accused had undergone a portion of the sentence of imprisonment wrongly imposed by the Magistrate on a conviction under the wrong section, the Chief Court declined to pass a fresh sentence or fine under the right section; but cancelled the remainder of the sentence inflicted.

Held also, that as the finding of the Magistrate was based upon some evidence the court, as a court of revision, were bound to accept it.

The Order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*) was as follows:—

The accused has been convicted of an offence under s. 39 of the Excise Regulation and sentenced to undergo rigorous imprisonment for fifteen days.

The offence charged was, that he sold toddy in a grove and not in the shop in which he had a license to sell it. He denied the alleged sale. The Magistrate has found upon the evidence that he sold toddy to two of the prosecution witnesses. The finding, based as it is upon some evidence, we are bound to accept.

The accused was not a person who had no license to sell. He was a license-holder and acted contrary to one of its conditions when he sold toddy at the foot of a tree. He ought to have been pun-

* Criminal Revision No. 48 of 1894-95, of the order of the City Magistrate of Bangalore, in Criminal Case No. 157 of 1895-96.

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ished under s. 42 and not s. 39 of the Regulation. The sentence of imprisonment which was passed by the Magistrate was wrong. He ought to have been sentenced only to pay a fine under s. 42. The accused having undergone a portion of the sentence of imprisonment, we do not propose to pass a fresh sentence according to the Regulation. The remainder of the sentence is remitted and the bond executed by the accused when he was released on bail is hereby directed to be cancelled.

Sentence remitted.

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July 27.

CIVIL AND MILITARY STATION OF BANGALORE.

APPELLATE CIVIL.

Before W. Lee-Warner, Esq., C. S. I., Resident.

B. FATHAYA CHAND (PLAINTIFF) *v.* J. WILKINSON (DEFENDANT).*

Lost promissory note—Stamp—Presentation for payment—Secondary evidence.

A Promissory Note was made at Ootacamund where the maker resided. It admittedly bore no stamps of the Civil and Military Station of Bangalore where the payee resided. A letter of demand was sent by post to Ootacamund and when suit was subsequently brought in Bangalore by the payee, he alleged that the note was lost and desired to give secondary evidence of its contents, and among other matters that it was made payable at Bangalore.

Held (by the Resident's Court, confirming the decree of the District Court) that the evidence was not satisfactory or conclusive as to the loss of the note; and consequently secondary evidence of its contents was inadmissible. But had it been otherwise, the note should have borne a Civil and Military Station stamp at the time the letter of demand was sent to Ootacamund, as such demand was equivalent to presentation for payment; and therefore a suit could not be brought for the amount of the note even had it been lost. *Further*, that under the circumstances of the case it was doubtful if the Bangalore Courts had any jurisdiction.

Mr. *Lubeck* for the appellant.

Mr. *D'Cruz* for the respondent.

The Judgment of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

Of the five grounds set forth for reversing the decree of the District Court the last, namely, that the Court erred in holding that secondary evidence of

* Appeal No. 6 of 1895, against original decree No. 2017 of 1884 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 9th day of March 1895.

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the contents of the promissory note was inadmissible is the essential one.

It is stated that the defendant, who is described in these proceedings as Mr. J. Wilkinson, but whose name is said to be Wilkins, had certain money transactions with the plaintiff, B. Fathoya Chand, who from the evidence and the books, recorded in the case appears to be engaged in lending officers and gentlemen money at usurious rates. He states that the defendant gave him a promissory note on January 2nd, 1891 for Rs. 800, being the balance of principal and interest then due. This was executed at Ootacamund but it is alleged that on it was endorsed "payable at Bangalore." The plaintiff, money-lender, states that he has lost the note, and the District Judge disbelieves his story suspecting that he was interested in losing it. The District Judge notices that the loss was not mentioned to Nagesa Rao nor to Mahomed Hussain, that "payable at Bangalore" does not read as if written by the defendant and that payment at Bangalore was so obviously for the convenience of the plaintiff that he might allege a loss to try to prove an addition to the note which was not on it. For reasons recorded this Court admitted in evidence a letter from the plaintiff to the defendant dated 30th August 1894 in which he asks the defendant on what date and at what interest the promissory note was given. This is referred to as clear proof that the promissory note was lost. I cannot accept it as such. An astute business-like money-lender like the plaintiff, whose letter book in evidence shows the care with which he collects his debts from officers in all quarters of the globe, is not likely to

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lose a promissory note, whilst if he did lose one or wish to get rid of one it is extremely probable that he would draw from his adversary any proofs that he could extract or any admissions which might be useful. No one can read the letters produced before the court without admiration for the business-like regularity and stern insistence upon his claims which the money-lender's letters betray. This much only need I say that neither the loss of the note nor its contents are proved to my satisfaction. No doubt a promissory note was given. No doubt it was for Rs.800. I accept the plaintiff's statement that it bore no stamp of the Civil and Military Station in which he sues, but I am not satisfied that the note is lost. I am only satisfied that it is not produced and I am not satisfied as to its contents.

I am not then satisfied under s. 61 of the Code of Civil Procedure that the instrument upon which the suit is founded is lost. But even if I were, can I allow the contents to be proved ? Here the Stamp Act (I. of 1879) s. 18, as applied to the Station by Notification No. 99 I. J., Foreign Office, dated 22nd May 1879, comes in the way. It is admitted that the note did not bear a Station stamp, but it is urged, 1st. that the stamp was only needed when the suit was filed; and 2ndly. that it was a physical impossibility to affix a stamp then to a document which was not in existence. A subsidiary question arises whether presentation occurred when the letter of demand reached Ootacamund or when the letter reached the Bangalore Post Office. I agree with the lower court that a demand is a presentation for payment, and that a Bangalore stamp should have been affixed, and that owing to its

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omission the promissory note if lost could not be sued on, and its loss cannot place the loser in a better position than the holder or possessor of it would be if it were not lost, seeing that the whole case rests upon the terms of the promissory note.

There are special reasons in the case of transactions between a professional money-lender and an embarrassed borrower why production should be insisted on of a document upon which a suit for the recovery of money is instituted. The law is asked to enforce the execution of a promissory-note, of the very contents of which it is ignorant. The correspondence produced shows a difference of opinion as to the treatment of payments made whether for interest or principal, as to rate of interest, and as to the place of payment.

I am not satisfied that this Court has jurisdiction; I am not satisfied as to the terms of the note; and I am not satisfied that the note is lost. The appeal is dismissed with costs.

Appeal dismissed with costs.

Before W. Mackworth Young, Esq., C. S. I., Resident.

Nov. 16

HONURAPA AND OTHERS (DEFENDANTS) v. VENCATARAMANAPA (PLAINTIFF).*

Hindu Law—Will by husband to wife—Alienation by wife of property devised—Cross-appeal.

V made a will of certain immovable separate property to his wife *B* and she after his death conveyed the property on sale to third parties. *V R*, the brother of *V* objected to this, claiming that *B* had only a life-estate and therefore the alienation was void and he was entitled to the property. He also filed a cross-appeal asking for

* Appeal No. 10 of 1895, against original decree No. 1668 of 1893 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 15th day of May 1895.

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costs and urging sundry objections against the decree of the lower court; and this cross-appeal was objected to on the ground that no decree had been passed against him and therefore no appeal lay except as to costs.

Held, by the Resident's Court, that the cross-appeal was maintainable. *Also* that on the proper construction of the will, no intention was disclosed in it of expressly authorising the widow *B* to alienate; and that consequently she was, in respect of alienation, subject to the general Hindu Law of Succession, *i. e.*, she would not be able to alienate. This being the position taken by the Calcutta and Allahabad High Courts which affirm that it is only when expressly provided in the will and where there is a provision expressly empowering a widow to alienate property devised, she can do so.

Mr. *Lawrance* for the appellants.

Mr. *M. Bhima Rao* for the respondent.

The Judgment of the Resident (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows :—

The plaintiff and Virapa were brothers. In virtue of a will said to have been executed by Virapa in favor of his wife Balama, the latter sold certain property to defendants Nos. 1, 2 and 3 with the consent of her brother, defendant No. 4.

The lower court has found that the plaintiff and Virapa were separate in interest, that the will is genuine, but that under the will Balama had only a life-estate and therefore the alienation was void and the plaintiff entitled to the property.

The appeal consists of four grounds, the fourth of which was however abandoned by the appellant's counsel. The three remaining grounds are :—

1. That the lower court erred in finding that the will conferred on Balama merely a life-estate without power of alienation.

2. That the lower court erred in finding that it was not the intention of the deceased testator to disinherit the plaintiff by the said will.

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3. That the lower court erred in finding that the will did not operate to convert the suit-property into the *stridhanam* of Balama descendible as such on her death to her heirs and not to the plaintiff as the reversionary heir of her husband.

In a cross-appeal asking for costs, the respondent urges:—

1. That the lower court erred in holding the will to be genuine, valid and binding on the plaintiff.

2. That the lower court erred in finding that the suit-property was the separate property of the deceased Virapa.

The appellant's counsel took exception to the cross-appeal on the ground that no decree had been passed against the respondent and therefore no appeal lay, except as regards costs. I overrule this objection for the reasons given in *Ishore Ghose* v. *Hills* (1) quoted in O'Kinealy's Notes on s. 561 of the Code of Civil Procedure, where it is observed that "a party may be satisfied with the decree of the lower court and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal, but he may not be willing to have the decree modified or altered upon appeal in favor of his opponents without having the whole decree set right," and that "he may support the decree on any of the grounds decided against him in the lower court."

I concur with the lower court in holding that the will was genuine. This much is practically admitted by the plaintiff-respondent in the fifth plea of his plaint, in which he stated that Virapa "got up" the will with the object of defrauding the plaintiff.

(1). W. R. Sp. No. 49; Marsh., 151, 153.

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I also consider it proved that Virapa was separate in interest at the time of making the will, from his brother the plaintiff. In no other way is it possible to account for the circumstances detailed by the lower court in dealing with the second issue. This being so, the will was valid and the only point which remains to be determined is as to the intention of the testator and in particular as to whether it was intended by him that his widow after his decease should have power to alienate the property. It is urged by the counsel for the appellants that the wording of the will, and particularly the word "swatantra" shows that the testator intended his widow to have full power over the property; while the counsel for the respondent urges that there is nothing in the will which shows that the testator intended the property to be removed from the ordinary provisions of Hindu Law, under which the widow holds immovable property for life only and has no power of alienation save for legal necessity. The law in this respect may be gathered from the rulings in *Koonjbehari Dhur* v. *Premchand Dutt*(1) *Bapuji Balal* v. *Satyabba Murai*(2) and *Kanhia* v. *Mahin Lal*(3) which however are not entirely in accord; for whereas the Bombay decision seems to affirm that a widow to whom a devise of immovable property is made stands in the same position as any stranger, *i. e.*, that she succeeds to the title of her husband, the Calcutta and Allahabad decisions seem to affirm that this is only the case where it is expressly provided in the will, and that in default of a provis-

(1). I. L. R. 5 Cal., 684. (2). I. L. R. 7 Bom., 491.
(3). I. L. R. 10 All., 495.

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sion expressly empowering a widow to alienate such property, she would in respect of alienation be subject to the general Hindu law of succession, *i. e.*, she would not be able to alienate.

The latter view is that tàken by the lower court, which holds that the will discloses no intention of expressly authorising the widow Balama to alienate. I have carefully considered the translation of the will filed by the plaintiff, which has been checked in my office, and I see no reason for interfering with the careful judgment of the lower court in this matter. I do not find any reason for taking up a stronger position in favor of the widow than that adopted by the Allahabad and Calcutta High Courts, and I do not see in the wording of the will any express intention of conferring thereby upon the wife of the testator the power of alienation, otherwise than in connection with the payment of the debts, which is not the connection on which the appellants' counsel relies for establishing his clients' case.

It is unnecessary for me to examine the point raised by the appellants' counsel regarding the succession to the property regarded as *stridhanam*, though according to Gray's Hindu Law of Inheritance p. 218 it appears that the husband's "sapinda" (or near relatives, as defined on p. 227) are preferred to the brother as heirs of the separate property of a woman, and therefore the respondent's claim to interfere is not excluded by the existence of a brother. But I have arrived at the conclusion that the property is not alienable by Balama and the point, therefore, does not arise.

I dismiss the appeal, costs of the respondent in

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this court to be borne by the appellants. I decline to interfere with the order of the lower court regarding costs.

Appeal dismissed with costs.

Before W. Lee-Warner, Esq., C. S. I., Resident.

March 2.

R. SUBBIAH SHETTY AND 4 OTHERS (APPELLANTS) v. THE JAGAN MOHINI NIDHI BANK, LIMITED, (RESPONDENTS).*

Limited Company—Winding up—Wishes of minority.

A court exercises a wise discretion in declining to make a winding-up order when the large majority of the shareholders of a Company were opposed to it, although a minority of the shareholders alleged certain omissions and irregularities which would ordinarily justify the court's interference.

Mr. *M. Bhima Rao* for the appellants.

The Judgment of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

A minority of the Jagan Mohini Nidhi Company, Limited, desires to wind up the Company on the ground of certain omissions and irregularities. The District Judge was not of opinion that it was just and equitable that the Company should be wound up or, at least, he dismissed the application. It is not alleged that the Company is insolvent and the large majority of shareholders desired to continue. It appears to me that the Judge exercised a wise discretion in declining to interfere at the present stage. The appeal made to this court must be dismissed.

Appeal dismissed.

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* Miscellaneous Appeal No. 1 of 1895, against the order of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, in Miscellaneous Case No. 269 of 1893, dated the 27th day of September 1894.

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Before W. Lee-Warner, Esq., C. S. I., Resident.

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August 3.

LALKHAN (APPELLANT) *v.* MR. WILLIAM JOHNSON (RESPONDENT).*

Civil Procedure Code (Act XIV of 1882) Chapter XX—Insolvent Judgment-debtor—Surety—Discharge.

The surety for a judgment-debtor, under s. 349 of the Code of Civil Procedure (Chapter XX) is discharged from his obligation when the judgment-debtor applies to be declared insolvent or when his application is rejected after his appearance.

Mr. *C. Murugesa Moodelliar* for the appellant.

Messrs. *J. C. S. Lawrance* and *T. S. A. D'Cruz* for the respondent.

The Judgment of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

I agree with the order of the District Judge that the person standing surety for the judgment-debtor, Mr. Denton, was released from the obligation when the judgment-debtor applied to be declared insolvent or when his application was rejected after his appearance. *Dwarkadas Parshotomdas* v. *Isabhai Daudkan* (1). The High Court of Bombay agrees, I observe, literally with the District Judge that release followed the application for insolvency. I am not required to express an opinion as to whether that irreducible minimum of satisfaction of the suretyship given suffices. In the present case the surety carried out to the full his bargain, and I agree with the order of the District Judge except as to costs, which in this court must be borne by the plaintiff. The order of the District Judge confirmed accordingly.

Appeal dismissed.

(1). I. L. R. 19 Bom., 211.

* Miscellaneous Appeal No. 1 of 1895, against the order of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, in Execution Case No. 190 of 1895, dated the 9th day of March 1895.

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March 16.

CIVIL REVISION.

Before W. Lee-Warner, Esq., C. S. I., Resident.

NAGALINGA SHETTY (PETITIONER) *v.* MOOTHOO SHETTY AND OTHERS (COUNTER-PETITIONERS).*

Civil Procedure Code (Act XIV of 1882) *s.* 206—*Conformity of decree with judgment—Amendment.*

On an application to amend a decree eight years old in order to bring it into alleged conformity with the judgment under s. 206 of the Code of Civil Procedure, the judge recorded "I am not prepared to say that the judge who passed the judgment did not intend to give the counter-petitioner the remedy which the decree gives her."

Held, that, as the section only requires amendment to be made "If the decree is found to be at variance with the judgment, &c.,' the judge was right in rejecting the application, as he was not satisfied such variance existed.

The Order of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

This court is applied to under s. 622 of the Civil Procedure Code to call for the records of the lower court mainly because the lower court ought to have amended the decree in order to bring it into conformity as alleged with the judgment. The decree was dated 12th March 1889, and defendant No. 3 applied for execution in 1894. Upon this the plaintiff sometime in 1894 or 1895 prayed for stay of execution and amendment of the decree passed in 1889. The District Judge on the 12th February 1895 observed that the petitioner had obtained a copy of the decree in March 1889, and for six years had never objected. The District Judge refused the application and it is averred that under s. 206 of the Code

* Civil Revision Petition No. 2 of 1895, against the orders of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, in Original Suit No. 2086 of 1888 and Miscellaneous Case No. 47 of 1895.

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of Civil Procedure, the District Judge was bound to amend the decree. But the law says: "If the decree is found to be at variance with the judgment or if any clerical or arithmetical error be found" the court shall, &c., &c. The District Judge in his order has said: "I am not prepared to say that the judge who passed the judgment did not intend to give the counter-petitioner the remedy which the decree gives her."

The Court is not, in my opinion, justified in re-opening the decision of 1889 on the plea now brought forward, nor was the District Judge wrong, in my opinion, in rejecting the application. I am not prepared in my discretion to admit this application and it must be rejected.

Application rejected.

Before W. Lee-Warner, Esq., C. S. I., Resident.

DULLA LAUL (PETITIONER) v. GUFFUR KHAN (COUNTER-PETITIONER).*

June 29.

Civil Procedure Code (Act XIV of 1882), *s.* 45—*Dismissal of suit—Discretion.*

Where a suit had been dismissed under s. 45 of the Civil Procedure Code, in order that the plaintiff might proceed in another way more in accordance with law, *Held*, by the Resident's Court, that the section gives a wide discretion to the court to arrest at an early stage litigation that is proceeding on a wrong basis and must prove infructuous; and as it did not appear the discretion had been exercised against the interests of the parties or of justice, it should not be interfered with.

Mr. *M. C. Alasingrachar* for the appellant.

The Order of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

It appears to me that s. 45 of the Code of Civil

* Civil Revision Petition No. 5 of 1895, against the judgment of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, in Small Cause Suit No. 591 of 1894, dated the 27th day of February 1895.

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Procedure intentionally gives the court a wide discretion to arrest at an early stage litigation that is proceeding upon a wrong basis and must in the long run prove infructuous. I am asked to compel the lower court to proceed with a suit which it has dismissed in order that the plaintiff may proceed in accordance with law. I do not consider that it would be to the interests of the parties or of justice to interfere to that extent, and I must decline to interfere as requested in the petition.

Application rejected.

Before W. Mackworth Young, Esq., M.A., C. S. I., Resident.

Nov. 16.

LOGANATHAM PILLAI (PETITIONER) v. C. MUNISAMI NAIDU (COUNTER-PETITIONER).*

Provincial Small Cause Courts Act (IX of 1887) Sch. II, Cl. 29—Jurisdiction—Partnership—Contract Act (IX of 1872), s. 239.

Where an Excise contractor made a contract with a retail vendor as to the terms on which the latter was to enjoy the privilege of retail vend, *Held,* that under s. 239 of the Contract Act, there was no partnership created, as the amount to be paid for the privilege was fixed and there was no combination of property, labor or skill, nor any agreement to share the profits. Consequently the Small Cause Court had jurisdiction to entertain a suit upon such contract, and was not debarred from doing so by Clause 29 of the Second Schedule of Act IX of 1882.

Mr. *M. C. Alasingrachar* for the appellant.

The Order of the Resident (W. MACKWORTH YOUNG, ESQ., M.A., C. S. I.) was as follows:—

The question on which the decision in this case depends is whether the Small Cause Court had jurisdiction. It is argued before me that it had not,

*Civil Revision Petition No. 11 of 1895, against the decision of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, in Small Cause Suit No. 1867 of 1894, dated the 27th day of June 1895.

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because the relations of the plaintiff and the defendant were those of partners. After reference to Exhibit *A* and to s. 239 of the Contract Act (IX of 1872) and clause 29 of the Second schedule to the Provincial Small Cause Courts Act (IX of 1887) I see no reason for holding that the relation between the plaintiff and the defendant constituted a partnership. Exhibit *A* merely shows that the defendant, the Excise contractor made a contract with the plaintiff, the retail vendor, as to the terms on which the latter was to enjoy the privilege of retail vend. There was no partnership; the amount to be paid for the privilege was fixed, and there was no combination of property, labor or skill, or agreement to share the profits.

I therefore reject the application.

Application rejected.

APPELLATE CRIMINAL.

Before W. Lee-Warner, Esq., C. S. I., Resident.

HUSSAIN AND ANOTHER (ACCUSED) v. THE GOVERNMENT.* *Feb. 23.*

Murder—Penal Code (Act XLV of 1860), *s.* 300—*Confession—Criminal Procedure Code (Act X of* 1882) *s.* 364—*Circumstantial evidence—Considerations for not passing death sentence.*

Confession was made to a Magistrate in Hindustani and by him recorded in Canarese. the language of his Court. He justified this course on the ground of the words and defects of the "butcher" language in which the statement was made; also that he always had recorded similar confessions in the language of the Court and that his head clerk was away on a holiday.

Held, that although it was doubtful whether the accused was in any degree whatsoever prejudiced by the statement which he heard read and which he signed, being taken down in Canarese supported

*Criminal Appeal No. 1 of 1895, against the conviction and sentence under s. 302 of the Indian Penal Code, by the Sessions Judge of the Civil and Military Station of Bangalore, in Sessions Case No. 2 of 1894, dated the 21st day of December 1894.

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by English notes, yet the law must notwithstanding be interpreted strictly. The magistrate's reasons on examination did not establish the conclusion that it was impracticable to record the confession in the language of examination. The practice of the magistrate, the absence of a single clerk or even verbal imperfections did not constitute such a condition of impracticability as the law requires, and the confession must therefore be rejected.

There being no other conclusive evidence against the second accused, his acquittal must follow the rejection of the confession.

As regards the other accused, there were other facts in evidence which led to the reasonable inference that he killed or helped to kill the deceased. At the same time it being impossible to say what precise part in the act that caused death was taken by this accused or what provocation was given to him. His conviction for murder was therefore upheld, but his sentence reduced to one of transportation for life.

Mr. *Eardley Norton* for the appellants.

Mr. *J. C. S. Lawrance* for the Government.

The Judgment of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

This case comes before the court both on appeal and in view of the necessity for its confirmation of the sentences of death passed by the lower court upon the two accused. It appears that the two prisoners Hussain, otherwise described in the proceedings as accused No. 1, and Patcha, described as accused No. 2, were charged with the murder of a woman named Ada or Edinnah Daniel on the night of the 14th or on the morning of the 15th October 1894, under the following circumstances:—

Ada lived an immoral life and had for some months before her death been kept jointly or severally by the two accused who rented a room in Kharkarcherie for Ada. Ada's sister, Sophie, occupied an adjoining room in the same house with one Gopali. The prisoners had been quarrelling with Ada about certain jewellery

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belonging to the deceased and pledged by them. On Sunday the 14th October 1894, the deceased with both the prisoners and her sister and Gopali visited the hospital in the Petta, and returned to her house from which she was subsequently called by a pimp named Pracashem to attend a call. According to the evidence of Pracashem the deceased was abused by the two prisoners for going, and upon her return she found Hussain and Patcha at her house and was left with them by Pracashem. Later on, according to the evidence of Sophie, at about 11-30 p. m. on the 14th October, Sophie heard a great disturbance, and with Gopali came out of the house and saw Hussain beating Ada with much violence on the ground. Patcha was, as alleged, in the room at the time. Her story continues that after separating Ada and Hussain, "I saw them enter Ada's room and I returned to my room." On her return she still heard them quarrelling but in course of time she fell asleep. Ada was not seen alive again after this incident. The story of Gopali confirms that of Sophie, in the main, up to this point. The story proceeds that at 8 a. m. on Monday the 15th October Hussain entered Gopali's room, and gave Sophie charge of a bundle. He then went out and returned to remark that Sophie had better pledge an ornament to purchase candles, flowers and incense, and tell her husband to make a coffin for Ada. Notwithstanding this hint, if in point of fact such a hint was ever given, Gopali left as usual for his work. Nor did Sophie move till it was time to take his food to her husband. She then looked and found Ada's door closed, and looking through a crevice, according to her statement, saw Ada's feet and called

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her sister Pussy and with her tried to open the door which was fastened on the inside. They failed to do so and then called Jerry Barnes and asked a passer-by to call a constable. According to the evidence of Jerry Barnes, this occurred about 11 a. m. or 12, on the 15th October. First-class Sergeant Lalkhan broke open the door in the presence of two witnesses, and found Ada dead and in a sitting position on the floor with her legs stretched out and a rope round her neck, the other end passing over the beam. The rope was not tight round the neck, and the rope was not a thick one. To the court it appears unable to bear a woman's body, but its weight-bearing power does not appear to have been fully tested. Lalkhan makes no mention of the accused No. 1's turban being found under the ankles. Lalkhan then called Inspector Hanumantha Rao who examined the place, and under his orders Lalkan went off to arrest Hussain. Hussain's mother said he was not at home, but the constable saw him and arrested him. According to the evidence of Lalkhan, Hussain broke down at once, cried and said to his wife that he might never return. The Inspector states that he found a white turban and a straw cap, between the ankles of the deceased. One slipper was found near the body and the pair to it was in the court-yard. These several articles are proved to have belonged to Hussain. A medical practitioner, Mr. Rozario, saw the body before it was removed from the position and place in which it was found, and he unhesitatingly asserted that it was not a case of suicide. He attributed death to strangulation. Assistant Surgeon Appiah, who did not see the body where it lay, received the body of the

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deceased at 7 p.m. on the 15th October, and examined it on the 16th October. He attributes death to hanging, but adds that the rope was not tight enough to have arrested the breathing of a living person. So far then his testimony is not in favor of suicide, although he attributes death to hanging rather than strangulation.

As to what occurred in the room after Sophie had sent Hussain and the deceased back to her room, we can only know what took place if the confession of accused No. 1 is admitted, and to that I shall presently refer. Of course the accused in their examination might have explained the facts which seem to tell against them, but they content themselves with a denial of their presence there on the night in question or indeed of any communication with the deceased for several weeks before her death. That denial is not believed by the Sessions Court nor does the learned counsel for the prisoners support it. The case then against the accused, so far as it depends upon the evidence of the witnesses is as follows:—An intention to do injury or perhaps to commit murder is inferred from the threats, the serious fighting and the quarrels which were renewed after Ada went into her room. The accused were last seen with the deceased and retired to her room about mid-night. The voice of accused No. 1 is still heard, and the quarrel interrupted is renewed. The silence of death succeeds. Then follows the self-incriminating return to the scene of accused No. 1, and his remarkable conversation: then the discovery of the death, followed by the arrest of accused No. 1 Hussain, and his tears and remarks. Finally there is a defence wholly irreconcilable with admitted facts.

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An alleged confession is put in in the Sessions Court which was given on the 27th October 1894 to the Second Magistrate, Mr. Abdul Rahman. There is no doubt that it was made in corrupt Hindustani, but it was recorded in Canarese, the language of the court. The magistrate who took the confession states that it was not practicable to take down the confession in the "butcher" Hindustani in which it was given. He goes on to justify his action on the ground of "the words and the defects of the language," and he explains that he always has "recorded similar confessions in the language of the court," and that his head clerk was absent on a holiday. On the other hand we have the fact that the statement of the same accused was actually taken down in the Sessions Court in Hindustani, and also that the magistrate admits that the clerk who was with him was as good as his own head clerk. I should be slow to presume that the proceedings of the Second Magistrate were not conducted in accordance with law, and since the magistrate was a Mahomedan acquainted with Hindustani, his testimony that he could not have correctly recorded the statement in the language spoken carries the more weight. Moreover the law, s. 364 of the Criminal Procedure Code, is addressed to the magistrate who records a confession, and it leaves the alternative and the discretion in the hands of the magistrate who examines; and finally when I look at the confession with its broad statement of facts in regard to which shades of expression do not seem to me to play any part, I doubt whether accused No. 1 was in any degree whatsoever prejudiced by the statement, which he heard read and which he signed, being taken

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down in Canarese supported by English notes. But notwithstanding all this I must interpret the law strictly, and since the magistrate has not merely stated that it was "impracticable to record the confession in the language of examination," but has given his reasons for his opinion, I am bound to examine them. They do not to my mind establish the conclusion drawn. The practice of the magistrate, the absence of a single clerk, or even verbal imperfections, which are the reasons given, do not constitute such a condition of impracticability as the law requires; and I must therefore reject the confession upon which the guilt of both the accused would have been established. With its rejection the case against accused No. 2 is so weak that I shall not further consider it. He was not seen fighting at midnight with Ada, he did not return with guilty conscience in the morning nor when arrested or since his arrest has he betrayed signs of conscious guilt.

As regards accused No. 1, Hussain, and the evidence against him other than the inadmissible confession I find that his own defence as put forward in his examination is wholly incredible and irreconcileable with the facts stated in the evidence on which I rely. I proceed to comment upon certain points of the defence of suicide now put forward. It is argued that the case has been worked up by the police. I find no trace of this and I may notice that Lalkhan, the police sergeant who first inspected the dead body, makes no mention of the bundle of the accused's turban and cap between the ankles of the deceased which other witnesses spoke to. Had he been tutored he would not have omitted this corroborative piece of

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evidence. Next, it is argued that the witnesses are disreputable. So they are for the most part from a moral stand-point, but no motive whatever is assigned for their conspiring against the accused. Too many witnesses build up the whole story and the relations of none of them with the accused were or are alleged to be strained. The evidence of outsiders and respectable men confirms the various details. Great stress is laid upon the alleged contradictions between Sophie's statement to the police made on October 15, and her examination before the Sessions Court. I have carefully considered each point that was argued by the learned counsel for the two accused, but I fail to observe any material contradiction. There are omissions no doubt in what the police took down as compared with the fuller story afterwards given. They were perhaps due to the Inspector or perhaps to the witness; but in the early suspicion of foul play, in the connection of Hussain with the deceased, and in the reference to their constant quarrelling, it bears out the main points of the later and fuller statement extracted by the Court and the pleaders at the various examinations of Sophie. In the next place stress is laid on contradictions between the testimony of Sophie and that of Gopali. I have been carefully over the several points referred to by the learned counsel for the prisoners and I can find nothing of such material importance as to justify me in discrediting the main story which connects accused No. 1 with the death of Ada by violence. I even regard some of these small differences and omissions as evidence that each witness truly states what he or she saw. The theory of the defence is hardly

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even plausible. That the deceased Ada was weary of life, was suffering pain from cystic tumours, had returned to an unhappy home and therefore committed suicide, is opposed to the evidence that she had partaken of a repast before her death, and that she could not possibly have hung herself with a rope which was not only thin but was not even tight encugh round her neck to have arrested the breathing of a living person.

Was there any motive for the deed? If the evidence is to be believed, there were threats and actual blows passing up to a late hour of the night. Accused No. 1, Hussain, and the deceased Ada were separated by others shortly before midnight, and even afterwards there were high words till sleep prevented the neighbours hearing any more. Accused No. 1 was excited and violent and he was last seen with the deceased. I find it perfectly possible, after examining the door produced in the court, for a man to open the door from the inside, and then pass out and reclose it again from the outside. The accused hovers round the room into which evidence has traced him and in which he was both seen and heard on October 14 at midnight and he reappears there in the morning. He hints at death. He is arrested and he cries, and finally his sole defence is that he was never there. All the evidence shows that suicide was impossible. It seems to me then quite reasonable to infer from the evidence that Hussain killed or helped to kill the woman whom he had previously knocked down, and with whom he was in the same room when she was last alive. Moreover, the absence of any marks of struggle or the absence of cries does not prove that he could not have done

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so. If the woman fell asleep after her dissipated course and the fatigues of the day and its quarrels, it was quite easy to strangle her and to make it appear as if she had hung herself. Such a presumption is not a theory. It follows naturally from the facts in evidence. Two people quarrel and fight. One threatens the other. They are last seen together. In the morning one is found strangled by a hand other than her own. The man with her last hints to others at her death before any one else has heard of her death, he weeps when he is arrested and compromises himself. His clothes are found about and near the deceased. The evidences satisfies me that no one but he can have caused, whether by himself or with others, the death of Ada, and that he intended to cause death or such bodily injury as he knew to be likely to cause her death. At the same time it is impossible to say what precise part in the act which caused death was taken by the prisoner Hussain or what provocation was given to him by the loud words or perhaps even blows of retaliation inflicted by the deceased. I do not consider that any of the exceptions to murder specified in s. 300 of the Indian Penal Code can be held to apply or are proved, but the Court which sentences has a discretion allowed to it by law, and in this case I must bear in mind that the assessors were not satisfied there was sufficient evidence to convict the two accused.

I agree with the assessors as regards accused No. 2, Patcha, and I am unable to confirm the sentence passed upon him by the Sessions Court. I direct that the sentence of death passed by the Sessions Court be set aside and that he be discharged. I concur

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with the Sessions Judge that the accused Hussain *alias* Mahomed Hussain is guilty of the offence specified in the charge, namely, that he committed the offence of culpable homicide amounting to murder and thereby committed an offence punishable under s. 302, Indian Penal Code, but I reduce the sentence to one of transportation for life.

Conviction of No. 2 accused set aside; and sentence of No. 1 reduced to transportation for life.

———(o)———

CRIMINAL REVISION.

Before W. Lee-Warner, Esq., C. S. I., Resident.

THE QUEEN-EMPRESS *v.* SHAMON.* *June 29.*

Penal Code (*Act XLV of* 1860), *s.* 429—*Mischief by killing, maiming or rendering an animal useless—Deliberate intention—Punishment.*

Where a valuable horse was found in his stable in intense agony from three or four severe blows which rendered it incurably lame and useless: and it was shown that no one but the accused, who was the horse's syce and in sole charge of it, could have inflicted the injuries, *Held* that a sentence of one month's imprisonment was quite inadequate and contrary to the intention of the legislature and to public interests: and it was accordingly enhanced to six months' rigorous imprisonment.

The Order of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

I find no reason to differ from the lower court in finding that the accused is guilty. It is clearly proved that the horse went out for exercise and returned to the stable sound. It is proved that no one but the accused was in charge of it. It is proved

* Criminal Revision No. 1 of 1895, on reference made by Mr. H. V. Cobb, Sessions Judge of the Civil and Military Station of Bangalore, in Criminal Case No. 73 of 1895, on the file of the District Magistrate of the Civil and Military Station of Bangalore.

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that the horse was found in the stable in intense agony with three or four severe blows inflicted upon it from which it is incurably lamed and rendered useless. One such blow the accused might have inflicted without the intention to cause such an injury. The presumption of deliberate intention with four such blows is very strong. The law prescribes an imprisonment which may extend to five years or fine or both. A punishment of one month appears to me quite inadequate and contrary to the intention of the legislature and to public interests.

I therefore confirm the finding of guilty under s. 429 I. P. C. but enhance the sentence passed by the lower court to rigorous imprisonment for six months in lieu of the rigorous imprisonment for one month passed on the 12th of June 1895.

Confirmed. Sentence enhanced.

June 29.

Before W. Lee-Warner, Esq., C. S. I., Resident.

THE QUEEN-EMPRESS v. VALABEE.*

Criminal Procedure Code (Act X of 1882) *ss.* 118, 124 *and* 406—*Security for good behaviour—Appeal.*

A person ordered by a Magistrate other than the District Magistrate to give security for good behaviour can appeal from such order to the District Magistrate. He mistakes his remedy if he resorts to the Sessions Court.

The Order of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

I do not think that it is necessary to call upon the Sessions Judge to certify to this Court the grounds

*Criminal Revision No. 2 of 1895, on reference made by A. M. Slight, Esq., District Magistrate of the Civil and Military Station of Bangalore, in Miscellaneous Criminal Case No. 131 of 1895, on the file of the Second Magistrate of the Civil and Military Station and Order of the Sessions Judge in Criminal Appeal No. 29 of 1895.

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on which he believed that he had jurisdiction. The law having provided in s. 406 and s. 124 of the Criminal Procedure Code a distinct remedy for a person required by a Magistrate other than the District Magistrate to give security under s. 118 of the same Code, the appellant Vallabee mistook his remedy. The judgment of the Sessions Court dated 17th June 1895 must be set aside and the order to the Second Magistrate re-called. The appellant must be informed that his remedy, if any, lies by appeal to the District Magistrate.

Order set aside.

Before W. Lee-Warner, Esq., C. S. I., Resident.

THE QUEEN-EMPRESS *v.* COOPOOSAMY.*

August 10.

Criminal Procedure Code (Act X of 1882), ss. 240 and 494—Withdrawal of charges—Proper course where s. 494 will not avail.

Section 240 of the Criminal Procedure Code applies only to remaining charges forming part of the same trial or case in which a conviction has been already made upon another charge with which they had been united. In a trial on a single charge, the procedure for its withdrawal is laid down in s. 494 of the Code; and where that section is not applicable, the proper course is either to convict or acquit; and in case of conviction, the magistrate may exercise his discretion as to passing a nominal sentence.

The Order of the Resident (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

In accordance with the order of this Court, dated the 27th July last, the accused has not appeared by representative or in person. I therefore pronounce order on the report.

* Criminal Revision No. 3 of 1895, on reference made by A. M. Slight, Esq., District Magistrate of the Civil and Military Station of Bangalore, in Criminal Cases Nos. 302 and 348 of 1895, on the file of the Second Magistrate of the Civil and Military Station, Bangalore.

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I am of opinion that s. 240 of the Criminal Procedure Code which attaches to withdrawal the effect of acquittal, deals only with remaining charges forming part of the same trial or case in which a conviction has already been based on another charge which was united with them. The proper course where s. 494 of the Code will not avail is either to convict or acquit. If the accused is convicted a nominal sentence may be passed. The police or the Municipality are not bound to prosecute, but if they do so, the magistrate must not, I think, exercise for them their discretion, but reserve his own discretion, in acquitting or passing a nominal sentence. A case in the Madras High Court Reports(1) may be referred to on the point of a nominal sentence.

In the present case it will be sufficient, without interfering with the proceedings brought to notice, to point out that course to the Second Magistrate for future guidance.

Record returned with remarks.

Dec. 19.

Before W. Mackworth Young, Esq., C. S. I., Resident.

THE QUEEN-EMPRESS *v.* VYDYALINGAM.*

Penal Code (*Act XLV of* 1860). *s.* 509—*Words or gesture intended to insult the modesty of a woman—Criminal Procedure Code* (*Act X of* 1882), *s.* 203.

Where a complaint disclosed facts which, if true, amounted to an offence under the Penal Code s. 509, a magistrate was *held* to be wrong in deciding that no criminal offence had been shown and in dismissing the complaint without enquiry, under s. 203 of the Criminal Procedure Code.

*Criminal Revision No. 4 of 1865, of order in Criminal Case No. 319 of 1895, on the file of the District Magistrate of the Civil and Military Station of Bangalore.

(1) 4 Mad. H. C. Rep. App. 66.

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The Order of the Resident (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows :—

In this case a woman complained that in the absence of her husband a man on two occasions used to her, words, and on one of the occasions gestures, which would insult the modesty of any modest woman. If the facts were as represented an offence was undoubtedly committed under s. 509 of the Indian Penal Code, unless the woman was of a profession or character which negatived the existence of scrupulousness. This is not hinted at in the record, nor does it appear that evidence would not have been forthcoming to support the complainant's story.

I do not think therefore that the Magistrate was justified in deciding that no criminal offence had been shown, or in dismissing the complaint without inquiry; and I direct that the Magistrate do make further inquiry into the complaint dismissed by him under s. 203 of the Criminal Procedure Code.

Dismissal set aside. Case remanded for retrial.

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June 1.

COORG CASES.

APPELLATE CIVIL.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

SUBIAH and THREE OTHERS (DEFENDANTS) *v.* IYANA (PLAINTIFF).*

Family debt—Decree against father—Liability of sons—Partition subsequent to decree—Fraud—Proof.

A having obtained a money decree against *B* sought to execute it against property which had fallen to the share of *B's* sons on a partition made between them and their father subsequent to the decree.

Held, that it was not proved the debt was contracted for family or necessary purposes. A head of a family owes a debt to the members of his family who have a right to claim their share in the property and a partition of family property after a decree for debt does not necessarily imply fraud.

If the decree-holder wants to pursue property no longer held entirely by his judgment-debtor, he must prove that its present holders shared the benefit of the debt incurred and consequently the onus of satisfying the decree involving their participation in the benefits of the debt. This must moreover be established by more than an inference.

Mr. *J. W. Hayes* for the appellants.

Mr. *L. Srinivasa Iyengar* for the respondent.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

The question is whether the plaintiff (respondent in second appeal) is entitled to execute his decree obtained against the first appellant by attaching the crops not only of the first appellant but also of his sons who have separated from him by formal deed since the decree was passed and who were living

* Appeal from appellate decree No. 6 of 1895, against the decree of Mr. Brooke-Legattt, First Assistant Commissioner of Coorg, in Appeal No. 32 of 1894, dated the 30th day of October 1894, reversing the decree of Mr. Madana, Subedar of the Yedenalknad Taluk, in O. S. No. 85 of 1894, dated the 15th day of June 1894.

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under the parental roof when the debt decreed and now sought to be executed was incurred. It is not disputed that there has been a separation, although to some extent father and sons are still living in the same house. The Court of first instance found, for reasons given, that the debt was contracted for the benefit of the first defendant only, but on an appeal which urged the view that the lower court should have presumed under the circumstances of the case that the debt was contracted for the benefit of the family, the First Assistant-Commissioner considered that the partition deed was executed for the sole purpose of fraud and that the lower court was wrong in holding that the debt was for the first respondent's private purposes. It seems to me not to be proved that the debt was contracted for family or necessary purposes. A head of a family owes a debt also to the members of his family who have a right to claim their share in the property, and a partition of family property after a decree for debt does not necessarily imply fraud. Several months have elapsed between the decree which has been partly executed and the division of the property which, at the time of the debt, was held partly in the interests of the children who have taken their share and partly for the use of the judgment-debtor. If the decree-holder wants to pursue property no longer held entirely by his judgment-debtor, he must prove that the present holders of the property shared the benefit of the debt incurred and consequently the onus of satisfying the decree involving their participation in the benefits of the debt. This must be established by more than an inference, and in the face of the finding

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of fact recorded by the court of first instance, I am unable to affirm the view of the lower court of appeal. The appeal is allowed and I restore the judgment of the court of first instance with costs throughout.

Appeal allowed with costs.

June 15.

Before W. Lee-Warner, Esq., C. S. I., Resident.

K. CARIAPA (PLAINTIFF) v. CHIMACHIRA MADIYA AND ANOTHER (DEFENDANTS).*

Mutation of names in Revenue Register—Members of undivided family necessary parties to civil suit—Representation of Government in suit—Jamma tenure—Sagu tenure.

Where the revenue authorities objected to effect a mutation of name asked for in the Revenue Register on the ground that the land being ancestral property the consent of all the members of the family represented by the applicant was required, *Held* in a civil suit brought to enforce mutation that the members of the family were necessary parties and that the Revenue officer should also be joined as representing Government if the lands were found to be *jamma*, as otherwise the decree would not be binding on the Government.

The suit was therefore remanded for decision in the first place, of the question whether the lands were *jamma* or *sagu* tenure and, if the former, whether the proprietors had power to sell: also for the addition as parties of all parties interested and of the Revenue officer.

Mr. *L. Srinivasa Iyengar* for the appellant.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

This is a suit for mutation of names in the Revenue records of Coorg. The plaintiff seeks to have 380 Bhathes of land, Warg No. 56 of Harihara village, changed from the name of defendant No. 1 Chimachira Madiya to his own name. The plaint alleges that in

* Appeal from appellate decree No. 2 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in Appeal No. 48 of 1894, dated the 18th day of October 1894, reversing the decree of Mr. M. Gopal Rao, Munsiff of Virajendrapett, in O. S. No. 767 of 1893, dated the 6th day of August 1894.

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1884 the lands then held on *jamma* tenure had been resumed by Government and that they were subsequently sold to the plaintiff by defendant No. 1. Defendant No. 1 agreed to the mutation of names but the Commissioner objected to make the order in the absence of consent of the members of defendant No. 1's family, since the land was ancestral property. Defendant No. 2 claimed possession of the lands on the ground that he had paid money to defendant No. 1 in consideration of which that defendant had resigned the lands in his favour, the other members consenting. The plaintiff was referred to a civil court. No registered deed is forthcoming to support the title of defendant No. 2, but he produces a *razinama* in his favor and explains that he intended to get a sale-deed.

The Munsiff decreed in favor of the plaintiff, finding that the plaintiff was in possession and could maintain the suit, and that the defendants' family was divided without any commonalty of interest and that defendant No. 1 was competent to sell and did sell to the plaintiff.

The District Court was of opinion that defendant No. 1 could not sell to the plaintiff without the sanction of the members of the family, professing to follow the judgment in the Somiandra case. The judge did not decide whether the plaintiff was in possession.

The first difficulty which I experience in this case is to determine the nature of the holding. Is it *jamma* or *sagu*? It is no doubt described by the witnesses (both in documents and in oral evidence) as *sagu*. It must however be admitted that it was originally a *jamma* holding and the Munsiff writes—"the first

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defendant put in an application praying for the delivery of the *jamma gutte* for the plaint-lands to him." * * "It was in consequence of this same application of defendant No. 1 and the order he obtained on it that the *jamma* tenure of the *warg* was attached and the *warg* became a *sagu* one." Now the conversion to *sagu* tenure certainly does not date from this. The District Judge distinctly writes "the Munsiff lays stress on the *warg* having been sold for arrears of revenue in 1888. Had that sale been effective, of course the *warg* would have ceased to be family property." As the cancellation of the sale saved the family tenure so also up to that date it probably left the *jamma* tenure unaffected. He then goes on to remark that the sale was cancelled but the court would not be justified on the evidence in concluding that the tenure of the land was by competent authority changed from *jamma* to *sagu*, or that the holder had any right to transfer without the written authority of the Government which granted the lands on *jamma* tenure with its incapacity to alienate. The first issue which the lower courts should have raised was whether the lands were on *sagu* or *jamma* tenure, and if they were held on *jamma* tenure whether the proprietors had a power to sell.

Defendant No. 1 sold the land described the land as *saju*; in certain criminal proceedings he admitted that the plaintiff was in possession. He is therefore estopped from denying the plaintiff's right to the mutation, nor can he alone now raise the issue just referred to. But the court, whose business it is to effectually and completely adjudicate upon and settle all the questions involved in the suit, and which is asked to order a

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mutation of names in the Revenue Register can, when the question of tenure is so clearly raised, and must, if it finds it to be *jamma*, direct the Revenue officer to be joined as defendant. Otherwise the court's decree will not be binding on Government.

As regards defendant No. 2 he holds no registered deed and the Munsiff rightly referred to s. 54 of Act IV of 1882. If defendant No. 2 were in possession, he might have called upon the plaintiff to show a better title, but the District Court has not expressed a decisive opinion on the question of possession.

It appears then that neither of the defendants can well deny the plaintiff's title and their own transactions with the land compel them to describe it as *sagu*; but the record shows that, besides the Revenue officers, who, if the land be *jamma*, may be interested parties, there are other persons who are interested in the questions involved in the suit and should be joined as parties. Defendant No. 2's written statement made it clear that there were members of the family, and the question of division or no division, as well as the extent of defendant No. 1's right, must be determined. If the family members had admitted the rights of one of their number or even had allowed the case to proceed *ex parte*, the plaintiff, by whom the decree for mutation is to be executed might in default of any objection on the part of Government, have been entitled to a decree. But they have not been heard and without them a final settlement of the case is impossible.

Here, however, I must refer to the line taken by the District Judge which seemed to him to render it unnecessary to join the family as defendants. The

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learned Judge finds that this court on the 8th February 1890, in the appeal of *Mukkatira Iyapa v. Somiandra Nanjapa and others*(1) laid down certain binding principles of law. Now in that case a distinct finding was recorded by the District Judge that there was no evidence of the plaint-land having been sold to meet family necessities. In the present case it is evident that the land was first mortgaged, and then alienated, to raise the funds for preventing its confiscation by Government owing to arrears of revenue being due. In the Somiandra case moreover, the Judicial Commissioner recited the fact that the lower court had found that the alienation was not called for by any imperative family necessity. Other special circumstances, such as that the lands were *bane* lands and that the land was self-acquired, arose in that case and the Judge's remark in the present case is that "the judgment in the Somiandra case has been ignored" appears to me somewhat general and precipitate. The learned Judge relies moreover upon a judgment of this court in second appeal (No. 16 of 1893). In that judgment my predecessor referred incidentally to the Somiandra case as laying down that "the holder of a maintenance share could not sell it without the consent of others." The District Judge there expressly found that the loan was not proved to have been contracted to pay off an antecedent debt or for the legal necessities of the family and my predecessor relied upon this finding when he upheld the decree of the District Court. Whenever a decision takes away or impairs rights acquired under existing laws, or attaches a disability in respect of rights which

(1) R. A. No. 1 of 1889.

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elsewhere attach to property, great care is needed to prevent an extension of the restriction, which, however sound in a particular case presenting special features, would not be justified under ordinary circumstances. The judgment to which my attention is directed would be sustainable in view of all the facts and issues then determined, but it would be dangerous to detach it from those facts, and still more dangerous to detach from them single sentences of the judgment which go beyond the issues raised and could not by themselves sustain the decree passed. It is argued that the decisions under consideration established a special Coorg custom. I am not prepared now to enter into that question. It is the function of a judge to give a clear definition of any custom or usage relied on; but usage is not immutable, nor can usage be ascertained without precise exposition. In the present case there is no parity of circumstances between the Somiandra case and the transactions with this land, be it *sagu* or *jamma*, which would justify me in regarding the case as closed.

It must go back to the lower courts for the purpose of joining all the members of defendant No. 1's family as parties and the Revenue officer as well, if the land be found to be *jamma* tenure. Fresh and fuller issues must be framed and tried which can partly be determined by the remarks made and can otherwise only be fixed when the defence is known. For this purpose I set aside the decrees of both the lower courts, and direct that the case be heard *de novo*. The costs hitherto incurred will be costs in the suit and abide the result.

Decrees of lower courts set aside.
Case remanded for retrial.

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July 6.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

NIRWANI SHETTY (DEFENDANT) *v.* RANASHETTY-PUTAPA SHETTY (PLAINTIFF).*

Admission—Rejection of documentary evidence—Evidence Act (I of 1872) s. 65(b) and s. 91, Ill. (e)—Contract Act (IX of 1872) s. 37—Civil Procedure Code (Act XIV of 1882) ss. 13 and 43—Res judicata—Admission in evidence of depositions taken in another suit.

C and *P* owed money to *R*, and *C* gave him an order upon *P* for coffee, which *R* passed on to *M* who passed it on to *N*, to whom the coffee was delivered in accordance with the order. *R* sued *C* and *P* on their bond; but his suit was dismissed, as they had satisfied their obligation by giving the order on which *N* had obtained delivery of the coffee. *N* was then sued by *R* and admitted receipt of the coffee but alleged that he had paid the value of it to *R*. This defence was held not to be proved and a decree was passed against *N* for the value of the coffee, which decree was upheld in appeal. *N* then preferred a special appeal. *Held* (1) that *N* having by his plea of payment and otherwise, admitted receipt of the coffee, the rejection of documentary evidence to show receipt was immaterial as such evidence was superfluous; (2) the alleged failure of *R* to obtain a decree against *N's* principal did not absolve *N* from liability in the present suit, which was not *res judicata* by reason of the former suit, which was on a different cause of action and against different parties from the present one; (3) the admission in evidence of statements *en bloc* made in another suit might be inconvenient but as it did not prejudice the parties it was no reason for dismissing *R's* suit.

Mr. *D. Venkataramiah* for the appellant.

Mr. *L. Srinivasa Iyengar* for the respondent.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

The plaintiff in the case stated that one Codimaniana Monnapa and Pathimada Carriapa owed him money and the former gave him an order upon the

* Appeal from appellate decree No. 3 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in Appeal No. 56 of 1894, dated the 27th day of October 1894, confirming the decree of Mr. K. Nanjapa, Munsiff of Mercara, in O. S. No. 10 of 1894, dated the 17th day of September 1894.

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latter to deliver to him some coffee. The plaintiff gave the order to R. Mallashetty who passed it on to defendant Nirwanishetty. The coffee was accordingly delivered on the 30th December 1890, to the defendant, and its value was Rs. 262-8-0. The plaintiff sues defendant for the value of the coffee and interest at 12 per cent. The court of first instance found that the defendant had received the coffee from Pathimada Carriapa on account of the plaintiff, that his allegation of payment of the value to the plaintiff was untrue, that the value of the coffee was Rs. 262-8-0 and that interest at 12 per cent was also due. Accordingly it gave a decree for Rs. 262-8-0 + 94-8-0. = Rs. 357 with interest at 6 per cent from the date of the present suit (January 4, 1894) until payment and with the plaintiff's costs.

The court of appeal rejected Exhibit *A/6* but held that its rejection was immaterial, because the defendant pleaded that he had paid the plaintiff the value of the coffee. It considered that the price of the coffee, Rs. 262-8-0 for 100 parahs, was reasonable and it dismissed the appeal.

Six grounds of special appeal are set forth :—1—Limitation ; 2—That the suit is not maintainable ; 3—That the order referred to is inadmissible and gives no cause of action ; 4—That sections 43 and 13 of the Civil Procedure Code bar the suit ; and 5 and 6—That the procedure of the lower court in returning the plaint and in other respects is irregular.

That the coffee was delivered to Nirwanishetty, the defendant, on account of the plaintiff seems evident from the evidence and the very admission of the defendant himself who states that he paid the value

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to the plaintiff. The inadmissibility of Exhibit *A/6* cannot disprove what is proved by the defendant's own admission and other corroborative evidence. I am referred to *Damodar Jagannath* v. *Atmaram Babaji*(1). In that case, Judge Birdwood was careful to state his reasons that "the plaintiff does not seek to prove the consideration otherwise than by the note," and because "his admissions do not amount to an admission of the claim." In the present case section 65 (*b*) of the Evidence Act and s. 91, Illustration (*e*) induce me to take the view that the lower appellate court rightly overruled this objection.

The next objection is that the defendant's liability has already been disposed of by the failure of the plaintiff to get a decree against his principal. Section 37 of the Contract Act is here referred to. It is argued that a suit against the defendant for the "chit" lies but not for the value of the coffee. Sections 43 and 13 of the Civil Procedure Code bar this second attempt to secure recovery.

Now the previous proceedings merely established the non-liability of the principal because he had transferred his obligation to another party. The other party admits receipt but sets up a plea that he paid the value, a plea which the courts wholly reject. In the case decided on the 25th September 1893 in the Munisiff's Court, the plaintiff sued on a bond dated 22nd March 1889 executed by Pathimada and Codimaniana. The court non-suited him, and the appellate court on the 15th December merely modified the decree so as to award some interest. The facts found by the courts in that point go far to establish the

(1) I. L. R. 12 Bom., 443.

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right of the plaintiff in the present suit in which a totally different cause of action arises against a different party Nirwanishetty who was not a party to that suit. The alleged failure of the plaintiff to get a decree against the principal does not cover the defendant's liability in this suit. The discharge of their liability by the defendants in the former suit does not make the dishonesty of Nirwani an acquittance of his liability.

As regards the procedure of the lower court in referring *en bloc* to statements made in another suit it is inconvenient, but it has not prejudiced the parties. No do I find other irregularities of procedure material. I find that the liability of the defendant is established without any reference to the chit, and I dismiss this appeal with costs.

Appeal dismissed with costs.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

October 17.

ABDUL GANI SAB (DEFENDANT NO. 1) v. T. B. KRISHNASAMY NAIDU AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 2).*

Unregistered deed—Priority of registered deed—Registration Act (III of 1877) *s.* 50—*Transfer of Property Act (IV of* 1882) *ss.* 53 *and* 54—*Fraud—Contract Act (IX of* 1872) *s.* 17.

A sold land of the value of Rs. 100 to *B* by unregistered deed; and *B* mortgaged the same land to *C* by a properly registered document, on which the latter subsequently obtained a decree and attached the land in execution. It was not however brought to sale and the execution proceedings were struck off the file. After this *A* sold the land again to *D* by registered deed. It appeared that *D* was cognisant of the previous sale to *B* and was a witness on the mortgage by the latter to *C*.

* Appeal from appellate decree No. 16 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in Appeal No. 17 of 1895, dated the 16th day of April 1895, affirming the decree of Mr. K. Nanjapa, Munsiff of Mercara, in O. S. No. 394 of 1894, dated the 31st day of December 1894.

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Held that "Fraud" being defined by the Contract Act (s. 17) as "any act fitted to deceive", *A* must be taken to have acted fraudulently in that, having sold the land for a consideration though without executing a registered deed, he subsequently sold it again to *D* under a registered deed. *Also*, that *D* was a party to the fraud inasmuch as he bought the land knowing that it had been previously sold by *A* to *B*. *Further*, the effect of the second sale being therefore to defraud under s. 53 of the Transfer of Property Act, the party defrauded being *C*, who succeeded in interest to *B*, *D* was held debarred, by reason of this fraudulent purchase, from coming into court to sue for a declaration that the land was not liable to be sold in execution of the decree held by *C*.

The principle laid down in *Ram Autar* v. *Dhanauri* (I. L. R. 8 All. 540) *followed* that a man cannot "on the strength of his own fraud, pray in aid of the provisions of the Registration Law to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this aspect of the matter such a document would not be a document in the sense of s. 50 of the Registration Act."

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *N. Cheluviengar* for respondent No. 1.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows:—

I am very unwilling to accept the conclusion of the lower courts that although "a moral fraud," or "very sharp practice" has been established against respondent No. 1, yet the appellant has no remedy at law.

The facts are briefly these. Defendant No. 3 about nine years ago sold land to defendant No. 2. The sale was not registered, though the value, as found by the lower courts, was Rs. 100. In 1889 defendant No. 2 mortgaged the land to defendant No. 1 the deed being properly registered. In 1890 defendant No. 1 obtained a decree against defendant No. 2 and in execution attached the land. The land however was not sold in execution, and the execution case was struck off the file in August 1892. In November

1893, defendant No. 3 sold the land under registered deed to the plaintiff. 1895

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The lower courts have held that this sale was effected in order to defeat defendant No. 1's claim, but have decided that as, under s. 50 of the Registration Act, a registered deed takes effect against an unregistered deed, and as, under s. 54 of the Transfer of Property Act, a transfer of land of the value of Rs. 100 and upwards can only be made by registered document, therefore the plaintiff is entitled to a declaratory decree that the plaint-land is not liable to be sold in execution.

It is admitted by the counsel for the appellant that if the plaintiff had come into court with clean hands, his suit must prevail, but that his action in obtaining the land under registered deed from defendant No. 3 was fraudulent, and he is therefore not entitled to a decree.

It is admitted by the counsel for respondent No. 1 (plaintiff) that he was cognisant of the previous transaction and this is clear also from the fact that he was a witness to the mortgage deed and from his evidence in the case brought by defendant No. 1 against defendant No. 2.

I find "fraud" defined in s. 17 of the Contract Act in very general terms as "any act fitted to deceive." I hold that defendant No. 3 acted fraudulently in that, having sold the land for a consideration, though without executing a registered deed, he subsequently sold it again to the plaintiff under a registered deed, and the plaintiff was a party to this fraud inasmuch as he bought the land knowing that it had been sold by defendant No. 3 previously to defendant No. 2.

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I therefore hold that the effect of the second sale was to defraud, under s. 53 of the Transfer of Property Act, and that the person defrauded was defendant No. 1 who succeeded in interest to defendant No. 2.

On this ground it seems to me not only equitable, but in accordance with law, to hold that the second transfer, being made with intent to defraud a prior transferee, is voidable at the option of defendant No. 1, and that the plaintiff is debarred from coming into court to sue for a declaratory decree that the suit-land is not liable to be sold in execution of the decree obtained by defendant No. 1, by reason of his fraudulent purchase.

The circumstances are not precisely similar to those of *Ram Autar* v. *Dhanauri*(1) because in that case the property was of less value than Rs. 100, and the registration of the first mortgage was not compulsory, but in that case the principle is enunciated that "the second mortgagee cannot on the strength of his own fraud pray in aid of the provisions of the Registration Law, to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this aspect of the matter such a document would not be a document in the sense of s. 50 of the Registration Act."

Although therefore I do not assert that the defendant's title to the land is good, I consider that the plaintiff is not entitled to call it in question.

Differing from the decisions of the lower courts I therefore dismiss the plaintiff's claim, but the parties will, under the circumstances, pay their own costs throughout.

Appeal allowed. Suit dismissed.

(1) I. L. R. 8 All., 540.

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Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

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August 10.

S. D. RAMA RAO (DEFENDANT) *v.* K. DODANA SHETTY (PLAINTIFF).*

Transfer of Property Act (IV of 1882), s. 51—Compensation for improvements—Trespasser—Bonâ fide holder under defective title—Notice.

D purchased certain immovable property, which had previously been sold by another vendor to *R*, and having obtained possession succeeded for some time in resisting the attempts of *R* to evict him. When at last *R* had obtained a final decree for the unconditional recovery of the land, *D's* claim for set-off for improvements and a right of entry to gather crops being rejected, *D* filed a suit for compensation for improvements he had effected to the land while in possession, *Held* that *D* was but a trespasser in wrongful possession holding adversely to the true owner; and even if he had paid moneys for the benefit and improvement of the estate on the *bonâ fide* supposition that he could prove his title, that would not alter the fact that he was a trespasser.

Section 51 of the Transfer of Property Act deals with improvements made by *bonâ fide* holders under a defective title, but *D* knew from the first that his title was disputed and that in fact he had no *bonâ fide* title at all, and was only a trespasser. *Further*, the legal action taken by *R* in previous suits was an adequate hoisting of the signal of danger; and although a challenged title is no doubt not equivalent to a defect in the title challenged, yet, where a party steps in between a prior purchaser who has rejected his purchase, and girds up his loins and makes haste to improve a property to which it is proved he has not a shadow of a title, the law will be slow to give him the position of a "transferee believing in good faith that he is absolutely entitled thereto."

Messrs. *L. Srinivasa Iyengar* and *Evers* for the appellant.

Mr. *Lawrance* for the respondent.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

The case will not be intelligible without some account of the proceedings which led up to it. Rama

* Appeal No. 5 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 2 of 1895, dated the 16th day of April 1895.

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RAMA RAO v. DODANA SHETTY.

Rao, the defendant-appellant in this case, bought the land in dispute, which at one stage of these proceedings was shown as *R* in a sketch map, (*Ex. L*) on the 17th November 1887 and registered his title in December 1887. The plaintiff-respondent, Dodana bought, it is alleged, the same land from another vendor on the 23rd December 1887 and as he was in possession proceedings were taken against him by the first purchaser Rama Rao. Rama Rao however wavered as to the course he should pursue. In January 1888 he filed a suit to get the sale-deed of Dodana declared fraudulent. But he abandoned it. He also applied to restrain Dodana from using the land and cultivating it, but as the defendant was in possession he was non-suited, and so he was forced to institute another suit in June 1888 for the eviction of Dodana. That suit after a variety of conflicting decisions he won, a second appeal to this court being dismissed on the 1st March 1890 and the decision confirmed dated the 13th June 1889 of the lower appellate court of the 1st Assistant Commissioner, which reversed the finding in the defendant's favor of the Subedar. All this while, the defendant Dodana, who in the present suit has become plaintiff, was in possession and at least it may be said that the course of true justice did not always run smooth, for his adversary Rama Rao abandoned one line of attack and only won on another after more than one reverse.

Rama Rao's difficulties in securing his purchased land did not end with the verdict in his favor. As is usual, fresh difficulties began with the execution of the decree. He had secured his title but he had not

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secured the land. Dodana in addition to raising objections as to the identity of the land decreed with the land sought to be taken over, claimed a set-off for improvements and a right of entry to gather the crops planted. The Subedar was ready to refuse the application, but the appellate court was not so disposed, and this court finally ordered the decree for unconditional surrender of the land to be executed. It was executed, but Dodana proceeded to institute the present suit for the recovery of Rs. 3,500, being compensation for improvements effected on the land whilst he was in possession of it. The improvements are not denied and the value, having been ascertained by a commission, is not denied, although it is pleaded that the plaintiff Dodana reaped full profit from them. The District Judge of Coorg found that, under s. 51 of the Transfer of Property Act, the plaintiff was entitled to compensation of Rs. 2,400 at Rs. 400 for each of the six acres of land, instead of Rs. 3,500 claimed, with costs in proportion, the Commissioner's fees being included in the costs.

In appeal to this Court it is urged that for twelve reasons the judgment of the lower court is defective. They may be summed up as follows:—

1st. That the plaintiff was a trespasser with no shadow of right to the land which he had purchased knowing that the vendor could give him no title to the same, and that, as he had no right to cultivate, so he has no right to claim compensation for his illegal action.

2nd. That, if he was authorised in cultivating the land, he did so as the defendant's agent, and as he has received a full return for his outlay, he is entitled

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to nothing more than the produce he has raised from the trees.

3rd. That the land in question is Survey No. 149 of 375 acres and not 6 acres as held by the court below.

Dealing with the first of these grounds as summarised, I find that the plaintiff Dodana, despite his purchase of the land, despite his possession until ousted, and despite the verdict of the lower court which was reversed against him on appeal, was but a trespasser in wrongful possession of land which belonged to the defendant Rama Rao. He held adversely to the true owner, and even if he paid out sums for the benefit and improvement of the estate, on the *bonâ fide* supposition that he could prove his title, of which *bonâ fides*, however, I am not convinced, that did not alter the fact that he was a trespasser. He cannot recover as against the true owner any sums so paid even though they have enured, as I find proved, to the benefit of the true owner. He must in fact bear the burden of his own wrong, *Tiluck Chand* v. *Sondamini Dasi*(1).

The learned District Judge relies upon s. 51 of the Transfer of Property Act. Now, that section deals with improvements made by *bonâ fide* holders under a defective title. In the present case I can only regard the plaintiff as a man who made haste to sink capital in an estate upon which he was a trespasser, to which he knew from the first that his title was disputed, and in respect of which he had no *bonâ fide* title at all. For the plaintiff it is urged that he

(1) I. L. R. 4 Cal., 566.

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acquired from a different vendor than the defendant, and that he had no suspicion even of the infirmity of his title. But surely the legal action taken by the defendant in previous suits was an adequate hoisting of the signal of danger. A challenge of title is no doubt not equivalent to a defect in the title challenged, yet where a party steps in between a prior purchaser who has registered his purchase, and girds his loins and makes haste to improve a property, to which it is proved he has not a shadow of a title, the law will be slow to give him the position of a "transferee believing in good faith that he is absolutely entitled thereto." These words absolutely accentuate the intention of the Legislature. Regarding the plaintiff as a trespasser I must reverse the finding of the lower court, and dismiss the suit with costs throughout on the plaintiff.

Appeal allowed. Suit dismissed.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

Nov. 5.

CHENDANDRA KAROOMBAYA (DEFENDANT No. 1) v. SAVERPINTO AND OTHERS (PLAINTIFF & DEFENDANTS Nos. 2 TO 6).*

Appeal by defendant—Liability of dismissed co-defendant to be made respondent.

An absolved defendant cannot be made respondent by another defendant and be made liable to the plaintiff's claim as decreed against that other defendant.

Mr. *Lawrance* for the appellants.

Mr. *L. Srinivasa Iyengar* for respondent No. 3.

* Appeal No. 6 of 1895, against the decree of Mr. G. F. Meiklejohn. District Judge of Coorg, in O. S. No. 24 of 1894, dated the 27th day of March 1895.

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CHENDANDRA KAROOMBAYA v. SAVERPINTO.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows:—

In this case the following rulings are quoted by the counsel for the respondent as showing that there is no appeal in the case:—*Ranjit Singh* v. *Sheoprasad Ram*(1); *Koylash Chunder Koosari* v. *Ram Lall Nag*(2). I am satisfied that these rulings decide the case. An absolved defendant cannot be made respondent by another defendant, and be made liable to the plaintiff's claim as decreed against that other defendant.

The appeal is dismissed. Costs of respondent No. 3 in appeal will be borne by the appellant.

Appeal dismissed.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

Dec. 14.

BIDANDRA IYANA (PLAINTIFF) *v.* ICHETTI DEVIA AND OTHERS (DEFENDANTS).*

Coorg Revenue Code, s. 53—Sale of land for arrears of revenue—Freedom from encumbrance—Fraud—Collusion.

D and *B* jointly owned immovable property. *D* mortgaged his share (one-third) to *I* as security for moneys borrowed: and some ten years afterwards the whole property was put up to auction for arrears of revenue and bought for a few rupees over the arrears for M, the eldest son of *B*. There was then some dispute and litigation between *D* and *M* as to whether the purchase at auction was for the benefit of the latter only or for the benefit of all the joint owners and ultimately *D* was declared owner of one-third of the property. *D* thereupon abandoned his right to *M*.

In a suit by *I* to enforce his mortgage, making *D* and *M* defendants, it was urged that under the Coorg Revenue Code, s. 53, the purchase at auction-sale for arrears of revenue gave the purchaser a title free from encumbrances, and *ipso facto* annulled *I's* mortgage: that the whole property was vested in *M* and he therefore

* Appeal No. 12 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 1 of 1895, dated the 16th day of April 1895.

(1) I. L. R. 2 All., 487. (2) I. L. R. 6 Cal., 206.

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held it clear of all incumbrances. It was found by the District Judge that *D* and *M* were not in collusion to defraud *I* although *M* "seeing his chance let the property go up for sale and bought it, thereby securing an undoubted title to the whole estate." *Held*, that this was equivalent to finding that *M* "knowingly became a defaulter together with *D* in order that the estate might be put up to auction for arrears of revenue and then paid for it something more than the arrears on the whole estate and secured a title free from encumbrance." *Further*, that the action of *M* in knowingly falling into arrears and getting the estate put up to auction was fraudulent and that as *D* was his co-sharer and the auction was brought about in his interests, he was party to the fraud. Both were defaulters and they must not be permitted to benefit by their own fraud. *Therefore*, notwithstanding s. 53 of the Coorg Revenue Code, the payment of the auction-price by one of the defaulters did not convey to him a title to the estate free of all encumbrances but that after the auction the estate was liable as security for the debt of *D* to *I* to the extent of the former's share.

Mr. *Evers* for the appellant.

Mr. *L. Srinivasa Iyengar* for the respondents.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows :—

The facts are fully set forth in the order of the District Judge.

Defendant No. 1 had one-third, and Beliapa two-thirds of an estate held by them jointly. Defendant No. 1 hypothecated his share as security to the plaintiff for a loan of Rs. 3,000 in 1882. In February 1892 the whole property was put up to auction for arrears of revenue and bought in for a few rupees over the arrears for Muthana, eldest son of Beliapa. There was some dispute between defendant No. 1 and Muthana subsequent to the sale as to whether the land had been bought in on behalf of the joint owners and a suit ensued in which defendant No. 1 was declared owner of 81 acres out of 243 acres or precisely one-third. Muthana who had obtained the decree for 162

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acres out of the 243 acres asked for a review, on the ground that he had become owner of the whole estate by the auction-sale. This was refused. Then defendant No. 1 without consideration gave up his right to defendant No. 2, Muthana.

The District Judge dismissed the suit as against Muthana and gave a decree against defendant No. 1, who under the above-mentioned arrangement no longer claims the land. The plaintiff has thus lost his security and seeks to establish his claim on the land alleging that there has been collusion in order to evade his just claim on the land. Since the suit was decided, Muthana has died and the estate is said to have now devolved upon his younger brothers Nanjappa, Bopu, and Somapa, the first of whom is an adult, and must be regarded as guardian *ad litem* for his younger brothers.

The ex-Subedar Monapa has played a conspicuous part in this case. He was cousin of Beliapa and is called uncle of Muthana, Nanjapa, Bopu and Somapa. He it was who purchased the estate at auction for Muthana; and the District Judge says of him "as he knew that the land he was bidding for was mortgaged to his brother-in-law, the plaintiff, it certainly was sharp practice his buying it for his nephew, but I cannot see that there was anything illegal about it."

The District Judge has considered the question whether defendant No. 1 and Muthana were in collusion to defraud the plaintiff, but has decided that this is not proved from certain correspondence put in evidence, though he records that the co-partner (Muthana) "seeing his chance, let the whole go up for sale and bought it thereby securing an un-

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doubted title to the whole estate." That is to say that Muthana knowingly became a defaulter together with Ichetti Devia, in order that the estate might be put up to auction for arrears of revenue and then paid for it something more than the arrears on the whole estate and secured a title free from encumbrance. If collusion is not manifest here, it is strongly presumable. It is asserted by counsel for the appellant before me, and not denied by the counsel for the respondents that the meaning of ex-Subedar Monapa coming forward at the auction was to deter others from coming forward to bid, as Monapa is a man of great influence. Also that Monapa has been the mover in all these proceedings. In view of the District Judge's remarks above quoted this appears very likely.

Counsel for the respondents relies solely upon the provisions of the Coorg Revenue Code (s. 53) for the exoneration of the land from the encumbrance created on it by defendant No. 1 having hypothecated it as security for his debt to the plaintiff.

There are three questions to be considered. (1).—The effect of the auction sale; (2).—The effect of the suit decreeing 162 acres to Muthana and (3).—The effect of Ichetti Devia's relinquishment of his rights to Muthana.

I hold that the action of Muthana in knowingly falling into arrears and getting the estate put up to auction was fraudulent, and that as Ichetti Devia was his co-sharer and the auction was brought about in his interests, he was party to the fraud. Both were defaulters, and they must not be permitted to benefit by their own fraud. Therefore

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notwithstanding s. 53 of the Coorg Revenue Code, I hold that the payment of the auction-price by one of the defaulters did not convey to him a title to the estate free of all encumbrances, but that after the auction the estate was liable as security for the debt of Ichetti Devia to the plaintiff, to the extent of the former's share. In this decision I believe I am only following the general law relating to frauds; but as regards the limitation of the rights of auction-purchasers when such purchasers are themselves defaulters in respect of the auctioned land, the case of *Raghavendrachar* v. *Subaraya Bhutta*(1) shows that in the neighbouring State of Mysore such limitation has been considered appropriate and *Rach Behari Bore* v. *Purna Chander Mozumdar*(2) also shows that in Bengal a similar restriction has been held to be justifiable.

It is not necessary to go much into the second and third questions, *viz.*, what is the effect of the decree obtained by Muthana for 162 acres of the land and of the subsequent relinquishment to Muthana by Ichetti Devia of his rights in the one-third share held by him. They can settle their own affairs. I merely decide that to the extent of one-third the estate is liable for the decree passed by the District Judge, and accepting the appeal I modify the decision of the lower court accordingly. The plaintiff will have a decree against Ichetti Devia, defendant No. 1, as passed by the lower court. If the decree is not satisfied within six months from this date, the land which has been hypothecated as security will be sold, and the sale-proceeds applied in satisfaction thereof. If the proceeds are insufficient

(1) 6 M. L. R., 215. (2) I. L. R. 15 Cal., 350.

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to satisfy the decree, defendant No. 1 will be responsible for the deficiency. Plaintiff's costs throughout will form part of the decree. Defendants will bear their own costs.

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BIDANDRA IYANA v. ICHETTI DEVIA.

Decree modified, with costs.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

BRAHMIN MANJIAH (PLAINTIFF) v. GOWDAGAL KUNJANNA AND OTHERS (DEFENDANTS).*

Dec. 14.

Rule of "damdupat"—Interest in suits between Hindus—Interest paid before institution of suit—Transfer of Property Act (IV of 1882), s. 76.

Held, that, in suits between Hindus in Coorg, the rule of *damdupat* which disallows interest greater in amount than the principal, should be applied. The ruling of the High Court of Madras in *Kakarlapudi* v. *Uppalapudi* (I. L. R. 1 Mad., 5) followed. *Further*, that interest paid before the institution of the suit should not be excluded. *Also*, that the plaintiff was entitled under s. 76 of the Transfer of Property Act to exclude from the account of profits enjoyed by him any sums paid by him on account of the defendants.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *N. Cheluviengar* for the respondents.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows :—

The main ground of appeal in this case is that the rule of 'damdupat' ought not to have been applied, and it is contended that the ruling in *Ram Kanye Audhicary* v. *Cally Churn Dey*(1), relied upon by the lower court does not apply, because the decision in that case was given upon a case arising in the Presidency-town of Calcutta and because the ruling has been

* Appeal No. 14 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 12 of 1894, dated the 10th day of October 1894.

(1) I. L. R. 21 Cal., 843,

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misunderstood and does not convey the meaning put upon it by the District Judge.

I cannot discover that the case above quoted was one arising in the Presidency-town. It is certainly the case that in Bengal outside Calcutta the rule has not been affirmed (*Het Narain* v. *Ram Din*(1)) and the point ruled appears to relate to the special application of the rule when applied correctly, so it does not seem to have much bearing on the present case.

But I find a ruling nearer home. In *Kakarlapudi* v. *Uppalapudi*(2) it was ruled that interest greater in amount than the principal cannot be recovered in a suit between Hindus in Madras. This ruling is quoted under s. 209 of the Civil Procedure Code by O'Kinealy (4th ed. 1893), and nothing more applicable to the present case is there quoted. The same rule obtains in Bombay; *Ganpat* v. *Adarji*(3) and *Nanchand* v. *Bapusahib*(4).

I find no better guide than these rulings and decline to interfere with the application of the rule in this case.

Nor can I see any reason for excluding interest paid before the institution of the suit. The District Judge has correctly included this item in the account, and was, I consider, justified upon the rulings I have quoted in refusing to allow interest in excess of the principal, whether before or after decree.

It is moreover certain that the plaintiff has excluded from the account of profits enjoyed by him any sums paid by him on account of the defendants. He was

(1) I. L. R. 9 Cal., 871.
(2) I. L. R. 1 Mad., 5.
(3) I. L. R. 3 Bom., 312.
(4) I. L. R. 3 Bom., 131.

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entitled to do this under s. 76 of the Transfer of Property Act, and it is incredible that he should not have done so. 1895

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I dismiss the appeal. Appellant will bear the defendants' costs in appeal.

Appeal dismissed with costs.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

K. SUBBIA (PLAINTIFF) v. N. MONAPA (DEFENDANT).* Dec. 21.

Defamation — Privilege—Judicial proceeding — Criminal Procedure Code (Act X of 1882) s. 4.

A complaint having been filed in the Court of a Magistrate, was by him referred to the police for enquiry and, during the investigation by the police, petitions were presented, containing alleged defamatory matter in respect of which suit was brought. *Held* that, although at the time the petitions were presented the case was in the hands of the police and no judicial procedure was actually going on, yet as a complaint had been filed before the Magistrate, it was competent to him to take evidence at any time after such filing: and therefore looking at the definition of "judicial proceeding" given in s. 4 of the Criminal Procedure Code—"any proceeding in the course of which evidence is or legally may be taken"—the petitions must be considered as having been presented in the course of a judicial proceeding and the statements made therein to be privileged.

The judicial proceeding initiated by the complainant was not interrupted in consequence of the investigation ordered by the Magistrate; nor were the petitions made in the course of the investigation alone. They were made with reference to and in the course of the judicial proceeding instituted before the Magistrate by the complainant.

Mr. *Evers* for the appellant.

Mr. *L. Srinivasa Iyengar* for the respondent.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows:—

The first and second grounds of appeal are practi-

* Appeal No. 10 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 15 of 1894, dated the 9th day of March 1895.

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cally identical and amount to this that the petitions containing the defamatory matter were not presented in the course of a judicial proceeding. It is argued by the counsel for the appellant that when the petitions were presented the case was in the hands of the police, that no evidence was being taken and no judicial procedure was going on and therefore they cannot be said to have been presented in the course of a judicial proceeding.

"Judicial proceeding" is defined in s. 4 of the Criminal Procedure Code as "any proceeding in the course of which evidence is or legally may be taken"; and reference is made on behalf of the appellant to s. 162 which provides that in the course of an investigation by the police no statement other than a dying declaration made to a police-officer may be used as evidence. But in the present case, a complaint had been filed in the Magistrate's Court and, though evidence could not be taken by the police in their investigation, it might at any time after the filing of the complaint have been taken by the Magistrate to whom the petitions were addressed. I cannot hold that the judicial proceeding was interrupted in consequence of the investigation ordered by the Magistrate; or that the petitions were made in the course of the investigation alone. They were in my opinion made with reference to and in the course of the judicial proceeding instituted before the Magistrate by the complaint filed by Monapa.

Under these circumstances the ruling in *Nathji Muleshvar* v. *Lalbhai Ravidat*(1), quoted by the

(1) I. L. R. 14 Bom., 97.

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lower court is applicable, and in accordance with that ruling the petitions must be held to be privileged. It is argued that this case is badly reported, and that the decision by the Privy Council in *Baboo Gunnesh Dutt Singh* v. *Magneeram Chowdhry*(1), shows how that decision is to be understood. This decision however deals with a case in which an action for malicious prosecution was brought and their lordships said that if it had been an action for defamation it could not have been sustained.

It is further argued that the petitions were not presented in the ordinary course of judicial proceeding and that the ruling given by the High Court of Madras in *Hayes* v. *Christian*(2), is applicable and shows that in the present case the petitions were not privileged. But I am unable to hold that the petitioner did not present his petitions in the ordinary course of the proceedings before the Magistrate. In the case referred to, the defamatory words related to a matter entirely outside the scope of the enquiry, whereas in the present case the allegation had direct reference to the conduct of Mr. Subbia in regard to the case pending. The allegation made in the former was an interruption by an accused person who was being defended by counsel, and it was held that if the charge had been brought forward in the course of the defence or in cross-examination, it would not have been actionable. The representation of the facts alleged to the Magistrate by means of petitions by the complainant was not, in my opinion, in itself improper, or made in such a way as to impair the privilege to which the accused was entitled.

(1) 11 B. L. R. 328. (2) I. L. R. 15 Mad., 414.

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The third ground of appeal, relating to the incorrectness of the translations of the petitions, does not effect the questions of privilege.

I dismiss the appeal. The parties will bear their own costs in appeal.

Appeal dismissed. No costs.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

Dec. 21.

N. MONAPA (DEFENDANT) *v.* BRAHMIN MANJIA (PLAINTIFF).*

Action for malicious prosecution—Malice—Good faith—Reasonable persuasion.

Where a document having been executed on a date later than that it bore, was characterised, by reason of its being so antedated, a forgery contrived for the purpose of nullifying a deed executed in *M's* favour, and *M*, mainly on this ground, charged the maker *V* of the document with forgery, *held*, in an action for damages for malicious prosecution brought by the latter against *M*, that this fact alone could not give *M* a reasonable persuasion of the truth of his charge. He had no direct evidence of it worthy of the name, but acted solely on a belief supported by rumour and by his knowledge of the character of *V*.

To justify an action for malicious prosecution it is necessary to show that the prosecution was launched by the complainant out of malice; and in order to establish malice, it is necessary to show that the complainant did not take reasonable care to inform himself of the truth, and did not honestly believe that the offence had been committed. The only question to be dealt with in such a case is the good faith of the defendant in bringing the charge, or in other words his reasonable persuasion of its truth, that he had reason for thinking and honestly did think that the offence charged had been committed and that by the plaintiff.

As no matters were urged on the part of the defendant *M* forming a sufficient ground for reasonable persuasion on his part that a forgery had been committed, he was rightly held liable in damages to the plaintiff, *V*.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *J. Evers* for the respondent.

* Appeal No. 8 of 1895, against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 18 of 1894, dated the 22nd day of March 1895.

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MONAPA v. BRAHMIN MANJIA.

The Judgment of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows :—

To justify an action for malicious prosecution it is necessary to show that the prosecution was launched by the complainant out of malice, and in accordance with the decision of the Madras High Court in the case of *Hale* v. *Venkatakrishna*(1), to which both parties appeal, it is necessary in order to establish malice, to show that the complainant did not take reasonable care to inform himself of the truth, and did not honestly believe that the offence had been committed.

In the present case, owing to the extraordinary conduct of several of the parties concerned, and the very doubtful character of the transaction from first to last, it is very important to exclude considerations which do not bear upon the question above stated. It is not material for instance to the present case that the plaintiff Manjia and his supporters were acquitted on the charge of forgery, because even though no forgery were committed, the defendant Monapa may have had reason for thinking and may honestly have thought that a forgery had been committed. Nor is it material to the present case to decide whether Venkatramana was acting under improper pressure when he agreed to sell his land to the defendant; because however unjustifiable the defendant's conduct may have been in this respect, it would not preclude him from charging the plaintiff and his associates with forgery if a forgery were committed, or if he had reason for thinking and honestly did think that they had committed it. Again it is not material to the

(1) I. L. R. 13 Mad., 394.

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present case to decide which of the alleged agreements of sale is legal. This point does not affect the question of malice.

I have in fact to deal solely with the defendant's good faith in bringing the charge; and by good faith, I mean, as above stated, his reasonable persuasion.

The lower court has dealt with the following grounds for such persuasion, *viz*,:—

1. The evidence of Rachia. 2. The information given him by Venkataramana. 3. The time allowed to elapse between the execution and the registration of the agreement (*Ex. A/32*) by Venkataramana in favor of Manjia.

I concur with the lower court in its conclusions in regard to these matters. I do not think that any or all of them formed sufficient ground for a reasonable persuasion on the part of the defendant that a forgery had been committed. Rachia's story was incredible, as forgers do not admit a chance person into their counsels, and even if credible it proves very little. Venkatramana had proved himself utterly unworthy of confidence and the inference from the delay in respect of the registration of the agreement is a very meagre one.

In the grounds of appeal, however, other reasons are urged to show that the defendant had a reasonable persuasion of the existence of a forgery. I take these in order.

First, the committal of the accused in the forgery case to the Court of Sessions by the District Magistrate is put forward as a sufficient indication of the reasonableness of such a persuasion. I cannot accept this argument. Any presumption which might be

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raised by the committal is entirely overridden by the decision of the Sessions Court at the trial.

Secondly, the conduct of Venkataramana is appealed to as justifying such a persuasion. This is put forward, and quite justifiably, as a separate matter from any information which the defendant may have received from Venkataramana. Now, Venkataramana's conduct throughout was most extraordinary. First, whether under pressure or otherwise, he was party to the deeds executed on the 10th August, as found by the lower court in its judgment in the case in which he was plaintiff. Then, notwithstanding that he had on the 15th August addressed a petition to the Commissioner complaining of the pressure brought to bear on him in regard to the sale of his land to Monapa, he nevertheless, whether compulsorily or not, stood before the Sub-Registrar on the 21st August as the alleged executor of the deed of sale conveying the land to Monapa, and as registration was effected, I must conclude that his denial of having executed it before the Sub-Registrar was false. Moreover he admits having had Rs. 3,000 in notes forced upon him on that day by Monapa and that he kept them in his pocket or with him till he was arrested on the 31st August, though he makes the incredible statement that he did not know they were notes. All this time he was in the hands of capable men who were advising him in regard to his selling the land to Manjia yet neither he nor they took any measures to rebut the natural conclusion that he had parted with his land to Monapa. I need hardly say that I entirely disbelieve Venkataramana's story. If Monapa's action in trying to get his land was discreditable, so

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was Venkatramana's action in regard to this attempt. Monapa was justified in entertaining a reasonable persuasion that Venkatramana had acquiesced in his acquiring the land, and the proceedings of the latter and of his friends coupled with their subsequent statements, and especially Venkataramana's affidavit and his statement before the Magistrate, lay them open to a charge of double dealing and falsity of which Monapa might well be reasonably persuaded. But the question is a narrower one than this; it is, whether Monapa had a reasonable persuasion that the document bearing date the 16th of August was, by reason of its having been executed on a later date and antedated, a forgery contrived with the purpose of nullifying the deed executed in his favor on the 21st August; and of this I must hold that he had no reasonable persuasion. He had no direct evidence of it worthy of the name, as shown above, and he had no business to act upon a belief supported by rumour and by his knowledge of the character of Venkataramana on which he had himself at first successfully played. His dupe became his deceiver, but it was not for him to devise his punishment, and the punishment which he sought to inflict was malicious in the eye of the law. He began with sharp practice, and this led him on to the use of sharp weapons which have turned against himself. That his opponents have been unscrupulous is no justification of their prosecution for an offence against the criminal law, of which he was not in my opinion reasonably persuaded.

In regard to the question of costs in the criminal case I see no reason for interfering with the decision of the lower court. The appeal for the award of costs

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to the defendant on the ground that the damages laid were excessive is unusual ; and the order of the lower court has taken proper cognisance of this fact in apportioning the costs recoverable by the plaintiff.

The appeal is dismissed. In view of the whole circumstances of the case the parties will bear their own costs in appeal.

Appeal dismissed. No costs.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

LAKSHMI NARNAIYA (PLAINTIFF) v. M. NARAYANA, A MINOR, BY HIS GUARDIAN VENKAMA (DEFENDANT).*

March 26.

Hindu family—Manager—Debt for family purposes—Presumption—Civil Procedure Code (Act XIV of 1882) s. 244.

Although assets of a Hindu family in the hands of the Manager may be liable under s. 244 of the Civil Procedure Code to a decree for a family debt by order instead of by suit, it is yet necessary first to determine whether or not as a fact the debt was contracted by the previous Manager for the benefit of the family; and that fact cannot be presumed.

Mr. *L. Srinivasa Iyengar* for the appellant.

Mr. *Nagarathna Pillay* for the respondent.

The Order of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

The facts are sufficiently stated in the District Judge's order dated October 24, 1894. The Judge finds nothing in the proceedings to show that the debt contracted by Annia was for family purposes and he refers to *Soiru Padmanabh Rangappa* v. *Narayanarao bin Vithalrao and another* (1) to show

* Miscellaneous Appeal No. 1 of 1895, against the order of Mr. G. F. Meiklejohn, District Judge of Coorg, in Miscellaneous Appeal No. 11 of 1894, dated the 24th day of October 1894, reversing the order of Mr. M. Gopal Rao, Munsiff of Virajpet, in Miscellaneous Case No. 355 of 1893, dated the 20th day of August 1894.

(1) I. L. R. 18 Bom., 520.

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that there is no presumption that a loan contracted by a Manager of a Hindu family is for family purposes. He therefore allows the appeal of Muhkati Narayana by his guardian and opens the door to further litigation. It is urged that the Manager is *ex-officio* accredited agent of the family and that the assets in the Manager's hands are available since he is the legal representative of the deceased, (s. 234 of the Civil Procedure Code), to satisfy the decree. The fact is accepted by the court below that Annia succeeded Kambia as managing member, and Annia was the uncle of the minor special respondent, M. Narayana. The question then is, whether under s. 244 of the Civil Procedure Code which, as ruled in *Punchanam Bundhopadhya* v. *Rabia Bibi* (1), is to be liberally construed to avoid litigation, the assets having come into M. Narayana's hands, the court executing the decree is not competent and bound to determine the question of execution by order instead of by suit. This presupposes that the debt is a family debt ; and, without going into the question whether the ancestral property has vested in M. Narayana by survivorship and not by representation, it seems to me necessary (even on the assumption that the special respondent is the representative of one party to the suit in which the decree was passed) to determine whether or not as a fact the debt was contracted by Annia as Manager for the benefit of the family. The Munsiff on August 20, 1894, only says—"The debt in question being contracted by the Manager of the family, the same is binding upon the family of the deceased Manager."

(1) I. L. R. 17 Cal., 711.

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The Munsiff does not find that the debt was contracted for family purposes, and since that fact cannot be presumed the District Judge rightly allowed the appeal. The second appeal must be dismissed with costs.

Appeal dismissed with costs.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

BALAGAI KUNDA AND ANOTHER (DEFENDANTS) *v.* T. A. WORSOP (PLAINTIFF).*

June 15.

Loss of cattle by caretaker—Liability—Negligence.

Where one of a herd of cattle was lost upon a stormy day in a mountainous country, the caretakers were *held* not liable, there being no evidence or even allegation of any specific act of carelessness or of any general laxity on their part. The standard of circumspection and care to be expected was only such as a reasonable person might require; and such reasonable care not being absent, liability could not be imposed.

Mr. *L. Srinivasa Iyengar* for the appellant.

The Order of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

The First Assistant Commissioner reversed the decree of the Subedar, who found that the defendants being in charge of some twenty-eight head of cattle belonging to the plaintiff had, through no negligence on their part, lost one of the plaintiff's cattle on a wet day in a very broken country and thereby caused him a loss estimated at Rs. 100. It appears that a rather troublesome bull was also being tended, and there is no evidence, nor even an allegation, of any specific act of carelessness or even of any general laxity on the part of the defendants. The Subedar dismissed the suit with costs.

*Civil Revision Petition No. 2 of 1895, against the decree of Mr. Brooke-Leggatt, First Assistant Commissioner of Coorg, in Civil Appeal No. 37 of 1894, dated the 18th day of October 1894.

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The court of appeal considered that negligence was established by the fact of the loss of the she-buffalo, but it considered that the value of the animal was over-estimated. It therefore gave the plaintiff a decree for Rs. 40 with costs.

I can find no evidence whatever of any breach of duty or absence of such diligence as the law requires. The standard of circumspection and care which can be expected from two keepers upon a stormy day in a mountainous country when in charge of a large number of cattle can only be such a standard as a reasonable person would expect. There is no evidence to show that any human foresight could have prevented the accident due to the alarm of an animal frightened by the storm. Directly the loss was noticed the keepers went in search of the missing animal. I allow the appeal and restore the judgment and decree of the court of first instance, but I amend the decree as to costs and each party will bear his own costs throughout.

Appeal allowed. No costs.

APPELLATE CRIMINAL.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

August 3.

LABE MUTHAPA v. THE QUEEN-EMPRESS.*

Penal Code (*Act XLV of* 1860) *s.* 211—*False charge—Institution of criminal proceedings—Criminal Procedure Code* (*Act X of* 1882) *s.* 20—*Malicious intent—Sentence—Functions of Magistrate.*

A complaint of dacoity was presented to a Second-class Magis-

* Criminal Appeal No. 2 of 1895, against the conviction and sentence passed by Mr. G. F. Meiklejohn, Sessions Judge of Coorg, under s. 211 of the Indian Penal Code, in Sessions Case No. 2 of 1895, dated the 4th day of July 1895.

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trate, who had no cognisance, and referred the case to the police contrary to s. 20 of the Criminal Procedure Code instead of directing the complainant to present his complaint to the proper tribunal. The case, however, went ultimately to a First-class Magistrate who committed to the Sessions where the trial resulted in acquittal.

On a charge under s. 211 of the Penal Code being brought against the complainant, it was urged in his defence that the presenting of the complaint to a Second-class Magistrate being *coram non judice*, was not an institution of criminal proceedings within the definition of a false charge with intent to injure and that the subsequent steps taken on the complaint were affected by the illegality.

Held, that the complainant had set the law in motion, and this constituted institution of criminal proceedings. The proceedings initiated by him ran their whole length and it was not denied that he had made the complaint which the courts declared to be false. The finding of fact by the Sessions Court that a false and malicious charge had been brought by the accused was based on a proper appreciation of the evidence, although there was a difference of opinion among the assessors and the judge as to the precise motive that actuated the accused.

A lenient sentence was passed by the Sessions Court owing to the irregularities of the police and their consequent delay. The Judicial Commissioner remarked that he should be disposed to place leniency rather on the excited feelings of the parties and the proneness to exaggerate of the society in which the accused lived.

Observations on the functions of a Magistrate in passing sentence, as being different from those he performs when coming to a finding of guilty.

Mr. *J. Evers* for the appellant.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

For twenty-two reasons, which it is unnecessary here to recapitulate, and which so far as is necessary will be dealt with hereafter, this court is asked to differ from the Sessions Court and the assessors and quash the conviction of Labe Muthapa for an offence under s. 211 of the Indian Penal Code and to set aside the sentence of four months rigorous imprisonment with fine of Rs. 50, or in default two months' rigorous imprisonment.

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The accused was found guilty of intending to cause injury to P. Ganapathi and four others, and of having with that intention brought a false charge of dacoity against them. The facts as to the accused having on the 9th November, made a complaint to the Subedar of Mercara; as to a written petition presented on 12th November to the Subedar charging P. Ganapathi and five others with having robbed him of Rs. 20 and struck him; as to the petition having been sent to the station officer, Murnad, who received it on the 15th, inquired into it on the 25th, submitted, it is alleged, an *A* sheet to the First-class Magistrate, who sent it on, as being an offence under s. 395 of the Indian Penal Code, to the District Magistrate; as to the District Magistrate finding on the 14th December 1894, that that the charge was entirely false; as to the subsequent prosecution of accused under s. 211 of the Indian Penal Code before the First-class Magistrate, who before passing judgment discovered that the case was beyond his jurisdiction; as to the alteration of the charge under s. 227 of the Criminal Procedure Code; and as to the committal to the Court of Sessions under the provisions of s. 347 of the Criminal Procedure Code, are all set forth in the judgment of the Sessions Court.

The first objection taken to the conviction is that the complaint was presented to a Second-class Magistrate who had no cognisance, and referred the complaint to the police contrary to s. 20 of the Criminal Procedure Code, whereas the complainant should have been told to present it to the proper tribunal. The argument, as I understand it, bears reference to the Indian Penal Code, s. 211. It is argued that a

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complaint disposed of as above and presented to a court not having jurisdiction is not an institution of criminal proceedings within the definition of a false charge made with intent to injure. A reference is made to *Queen Empress* v. *Jummo Boy*(1) but with it I must read also *Karim Buksh* v. *The Queen-Empress*(2). In the former case, which came before the Calcutta High Court in 1881, the charge never went beyond the station-house officer. In the later case, decided in 1888, the complaint to the head constable resulted in a local enquiry and the report by the police that the charge was false. The court held that the complainant had set the criminal law in motion and that this constituted institution of criminal proceedings. In the present case the proceedings ran their whole length, and it is not denied that the complainant made the complaint which the courts declared to be false. I must reject this argument for reversing the Sessions Judge's decision.

It is next argued that there was no malicious intent, that the charge was *primâ facie* proved by the *A* sheet, by the 5th and 7th witnesses for the defence, that the witnesses to the contrary are biassed, and that the court is mistaken in arriving at the conclusion that the charge of dacoity ought to have been established, or that it was a counter-charge against the false measure case by way of retaliation. Now all these and the other grounds of appeal amount to a challenge of the finding of the Sessions Court that, with intent to injure P. Ganapathi, the accused falsely charged him and others with an offence punishable with imprisonment for seven years and upwards knowing that there was no just and lawful ground for such

(1) I. L. R. 6 Cal., 620. (2) I. L. R. 17 Cal., 574.

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charge. The Sessions Judge comments on the later embellishment of the charge made by the accused as compared with his statement to the Subedar, on the variations between his written complaints and his deposition in the criminal case, and on the evidence of various witnesses. I am not prepared to endorse or contest that part of the Sessions Judge's finding in which he discusses the motive of the accused in bringing the false charge. I notice that the assessors differ as to the precise motive. It is quite certain that a quarrel about coffee arose, and that from angry words the accused proceeded to make a nominal charge, of which he varied the details from time to time and of which a court of law has established the falseness. I can only agree with the assessors and the Sessions Court in their appreciation of the evidence and their finding of fact that a false and malicious charge was brought by the accused.

The Sessions Court has dealt leniently with the convicted Muthapa owing to the irregularities of the police and the consequent delay. I should be disposed to place any leniency I might show on the excited feelings occasioned by the dispute and the proneness of Coorg society to exaggerate. But on the other hand a Magistrate in passing sentence has a different function to perform from that he performs in finding whether the accused is or is not guilty. In the latter function he must look to the evidence and nothing but the evidence. In the former he may be guided by considerations of public interest, of the ends of justice, of the deterrent as well as the retributory side of justice. Many cases have come before me in which the most unjust and reckless charges

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are filed in Coorg against individuals and against officials. The grave responsibility of setting the law in motion, of trying through the action of the courts to inflict injury upon neighbours, and of bringing false or at least exaggerated complaints is not realised. A court of law has found this charge of dacoity to be absolutely false, another court has found that the accused in the present case knew the charge to be false and with intent to injure his adversaries instituted criminal proceedings and made false charges against them.

I must reject the appeal.

Appeal rejected.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

KONGETTI POOVIA (APPELLANT) v. THE QUEEN-EMPRESS.*

Aug. 17.

Penal Code (*Act XLV of* 1860) *ss.* 182 *and* 499—*False information—Defamation—Criminal Procedure Code* (*Act X of* 1882) *ss.* 195, 230 *and* 537—*Knowledge that information was false—Meaning of reputation—Sanction—Order to prosecute—Production of proper sanction after institution of proceedings.*

A petition was presented to a Government officer, stating that *D* a clerk in his office was trying and threatening to "take forcibly possession" of certain land belonging to the petitioner and also that there was "a great contention by all powerful man to take forcibly wrongful possession." *D's* name was mentioned in the petition and there could be no doubt that the allegations referred to him. *D's* superior ordered him to prosecute the petitioner for defamation or any other charge he might be advised to bring. Later on *D* applied for permission to prosecute under s. 182 of the Penal Code and sanction was accorded him under s. 195 of the Criminal Procedure Code.

Before the grant of this latter sanction, however, *D* had obtained summons from the Magistrate against the petitioner under ss. 182 and 500 of the Penal Code and during the currency of these pro-

*Criminal Appeal No. 4 of 1895, against the conviction and sentence passed by Mr. M. Belliappah, Second Assistant Commissioner and First-class Magistrate of Coorg, in Criminal Case No. 14 of 1895, dated the 21st day of June 1895.

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ceedings produced the sanction granted to him under s. 195 of the Criminal Procedure Code.

The petitioner was convicted under both ss. 182 and 500 of the Penal Code.

Held, that allegations having been made which were proved false, and the tendency of which were undoubtedly to cause a public servant to use his lawful power to do something which he ought not to do if the true facts were before him, the offence under s. 182 had been committed. It was useless to urge that the petitioner did not know the information to be false. His statements were false, he made no attempt to prove them and a man must be assumed to know that which he has no *bonâ fide* reason for not knowing.

Also, that as "reputation" means "public opinion," a complaint against *D*, a head clerk that he had abused his powerful position to take forcibly wrongful possession of another man's property, must harm *D's* reputation and cause him injury: and therefore, as the case did not come within any of the exceptions to s. 499 of the Penal Code, the offence punishable under s. 500 had been committed.

Further, that the order to prosecute given to the petitioner was not such a sanction as the law requires. It was not given with special reference to s. 195 of the Criminal Procedure Code; and did not comply with the requirements of that section. The Magistrate however had issued process not only under s. 182 of the Penal Code, but also under s. 500, which latter needed the sanction, and before ever the accused could be prejudiced, a proper sanction to a prosecution under s. 182 had been produced; so that when the accused appeared to be tried, the court could take cognizance of both offences. The later sanction was therefore sufficient to support the prosecution.

Further, having regard to ss. 195, 230 and 537 of the Criminal Procedure Code, the conviction if otherwise sound could not be reversed by reason of the omission to produce sanction at an earlier period.

Messrs. *Lawrance*, *Evers* and *L. Srinivasa Iyengar* for the appellant.

The Judgment of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

It appears that on April 24, 1895, Kongetti Poovia addressed a petition to the Commissioner of Coorg. The petition set forth that the petitioner had pur-

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chased a long lease of a coffee estate from Makatur Thimapia who had acquired it from Lakana Poovana and Kalapa, and that he had spent money in preparing the estate and the five acres of jungle land attached to it. In April 1894 about six weeks before the lease was executed, Lakana and Kalapa had, it was alleged, executed an agreement in favor of Thimapia for Rs. 3,000 for alienating fifteen acres of jungle as soon as certain rules under consideration were promulgated whereby *jama* lands might be alienated. The petition went on "That your honour's Head Sheristadar, Mr. F. Dinshaw, purchased the said agreement of Rs. 3,000 from Gangama, the wife of Thimapia, who died in Mysore on the 6th of September last for Rs. 1,000 which was paid by his intimate friend Rotti Mohamed Khan in his house in Mahadevpet, and that one Bhantra Ramana Rai, his another intimate friend lent his name as purchaser and that on the 20th of March the said Ramana Rai, Darashaw, cousin of Mr. Dinshaw, Rassul Khan, the son-in-law of Rotti Mohamed Khan, had been to the land which the petitioner had made ready to plant, with the intention of forcibly taking wrongful possession of the said piece of land on the pretext that it is included in the land which is described in the said agreement." The petition went on that "Mr. Dinshaw nominally adopting Ramana Rai's name as purchaser with the aid of poor people who are debtors of Rotti Mohamed Khan, is trying and threatening to take forcibly possession of this five acres of land." Later on, the petition continues—"though it is difficult to prove that the land is purchased on account of Mr. Dinshaw which is carried with such a deep and careful consideration, all

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the facts go to show that the land is intended for him." Yet again the petition referred to "a great contention by all powerful man in the person of your honour's office Head Sheristadar, through his name-lender with the aid of his friend Rotti Mohamed Khan who has many retainers indebted to him to take forcibly wrongful possession of the said five acres from the petitioner."

Upon the receipt of this petition the Commissioner ordered Mr. Dinshaw to prosecute the petitioner for defamation or any other charge he might be advised to bring. This order was dated April 24, 1895. On May 20, moved by Mr. Dinshaw, who applied for permission to prosecute the petitioner under s. 182 of the Indian Penal Code, the Commissioner for reasons recorded, sanctioned his prosecution under s. 195 of the Criminal Procedure Code. But proceedings had already been taken in the Court of the First-class Magistrate, who on the 25th April 1895, ordered summons to issue under ss. 182 and 500 of the Indian Penal Code. Proceedings were stayed to enable the accused to apply to this Court for the transfer of the case or the revocation of the permission. The trial of the case by the examination of the complainant did not begin until May 27, 1895. On that day, the accused was charged under s. 500 of the Indian Penal Code. An adjournment was granted to enable the accused to produce witnesses, but he produced none, and on June 21, 1895, without any charge having been framed under s. 182, a procedure which the Magistrate held to be justified by s. 242 of the Code, the accused was convicted under s. 182 of the Indian Penal Code, and sentenced to a fine of Rs. 100 or in default to two

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weeks' rigorous imprisonment, and to a fine of Rs. 200 under s. 500 of the Indian Penal Code, or in default to three weeks' simple imprisonment, with an order that Rs. 150 of the fine should be awarded to Mr. Dinshaw under s. 545 of the Criminal Procedure Code.

Against this sentence an appeal has been preferred and has been transferred to this Court. The facts of the case are not disputed. The petition was written and the accused has not only not proved the statements to be true, but they are disproved by the complainant. The complainant however admits that he received permission to look at some other land for purposes of acquisition and the alarm which such a permission might inspire where the intending purchaser is placed at the right hand of a high official must be borne in mind. This Court has however to deal with questions of law and questions of justification rather than with any denial of the imputations made or any plea that the imputations were true.

The first ground of appeal is that no offence was proved. Now the petition distinctly charges Mr. Dinshaw with trying and threatening to "take forcibly possession of the five acres" and with "a great contention by all powerful man * * * to take forcibly wrongful possession." Allegations of fact are made which are proved to be false, and it is as clear as day-light that the head of any public office who was told that his subordinate was using his power in his office to "take forcibly wrongful possession," must infer that the subordinate intended to cause that public servant to use his lawful power to do something which he ought not to do if the true facts were before him. It is alleged that there was no harm committed in inquiring about

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the property and that the administrative orders of August 4, 1883, were not infringed so as to render the head clerk liable to dismissal. I should interpret those orders very strictly in the case of any official subordinate to me, but this is really beside the mark. The petition does not refer to these orders. It alleged an intention to commit an offence punishable by the Penal Code. It certainly alleged the grave offence of a misuse of official authority for which departmental punishment should be awarded. Under s. 182 an offence was disclosed, and if the information was known to be false it was committed. But it is alleged that the petitioner did not know it to be false. Nay, that he *bonâ fide* believed it to be true. It is much to be regretted that Coorg officials should be allowed to purchase land, and when the land which they wish to acquire is likely to form the subject of dispute or reference to official authority, the purchase ought to be prohibited. But, as I have observed, the petitioner went further than complaining of a purchase. He alleged an intention to "take forcibly wrongful possession," and for that purpose he formally stated as facts assertions which he has made no attempt to prove. His statements were false, and a man must be assumed to know that which he has no *bonâ fide* reason for not knowing. At this stage I may pass on to another ground of appeal.

Prosecution under s. 182 of the Indian Penal Code requires formal sanction under s. 195 of the Criminal Procedure Code, and such sanction was not given before the complaint was instituted. Now, the general sanction given on April 24, 1895, was not, in my opinion, such a sanction as the law requires. It was an order to the clerk and not a sanction with special

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reference to s. 195 of the Criminal Procedure Code. Such a sanction ought to be explicit and it ought to specify one of the offences contemplated by that section, although the accused may be found guilty of another offence referred to in the section without a fresh sanction. The Magistrate however issued his process in regard to another section of the Penal Code, and before ever the accused could be prejudiced, a proper sanction was produced; and when the accused appeared to be tried, the Court could take cognizance of both offences. Whilst then I reject the first sanction as inadequate, I consider that the subsequent sanction was sufficient. Reading ss. 195, 230 and 537 of the Criminal Procedure Code, I have no doubt that the conviction, if otherwise sound, cannot be reversed by reason of the omission to produce the sanction at an earlier period. Thus falls to the ground the third reason of appeal.

I pass on to the offence of defamation. It is urged that reputation means public opinion. Admitting this, I cannot doubt that a complaint against a head clerk that he had abused his powerful position to take forcibly wrongful possession of another man's property, must harm a person's reputation and cause injury to the individual. The conditions of Explanation 4, s. 499 of the Indian Penal Code are fully met. The first Exception will not serve, as the imputation was untrue. The second will not serve, because more than an opinion was expressed and false facts were alleged, and the conduct of the officer was not in the discharge of his public functions. The eighth Exception will not serve, because good faith is not proved, and the accusation was reckless and untrue. No due care or at-

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tention was shown and the ninth Exception will not serve.

Holding that the petition was not made in good faith, that the facts alleged are not proved and were not believed to be true by the petitioner, that the imputations thus made were harmful to the reputation of the clerk and were calculated to make his superior officer use his lawful power to the injury of Mr. Dinshaw, I must dismiss the appeal and confirm the sentence passed.

Appeal dismissed. Sentence confirmed.

———(o)———

CRIMINAL REVISION.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

March 23.

In re CHENNA MAISTRI AND OTHERS (ACCUSED).*

District Magistrate also acting as Superintendent of Police—Conduct when trying cases enquired into by his police subordinates—Identification—Conclusive evidence—Excessive punishment.

A case of riot was enquired into by the Police; and the District Magistrate, who was also Superintendent of Police, took up the case in his court without any interval of delay. He tried the case and convicted the accused, sentencing them to very heavy sentences. It appeared that he was content with a general vague identification of accused persons against whom no specific acts were alleged, to convince the court that they were actually using force or had a common object with those who did use force; and the trial was altogether conducted in a hasty and perfunctory manner.

Held, that although it was perhaps inevirtable that the two functions of District Superintendent of Police and District Magistrate should be combined in one officer, and there was nothing to shew that the Magistrate took, as Superintendent of Police, a direct part in the police inquiry or in any way allowed himself to be prejudiced by the action of his subordinate police when he sat as Magistrate, yet, where the Magistrate is also, however nominally, the

* Criminal Revision Petition Nos. 5 and 6 of 1895, against the order of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, in Criminal Appeal No. 3 of 1895, dated the 16th day of February 1895.

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Superintendent of Police, a special obligation rests on him to act with such manifest deliberation and attention to the safeguards provided by law as to dissociate his magisterial from his executive action not merely in fact, but even in appearance.

In all cases of rioting and unlawful assembly it is most desirable, in view of the difficulties of identification in time of excitement, to cross-examine the witnesses and obtain specific details. Such a case as the present demanded a patient inquiry and time should have been allowed to the accused to obtain advice and consider their defence.

Considering, therefore, the personnel of the court, the nature of the offence charged and the incidents of the riot, a more than usually patient procedure was demanded, and the facts ought to have been examined with some minuteness; but the Magistrate conducted the trial with more than usual despatch, and this was to the undoubted prejudiced the accused, against the majority of whom there was no sufficient evidence, while in regard to those against whom evidence was forthcoming, the infliction of the maximum penalty was excessive.

Mr. *Nagarathnam Pillé* for Petitioner No. 1.

The Order of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

The procedure adopted in this case in the Court of the District Magistrate was so summary as to incur the risk of a miscarriage of justice. With more patience cases which now appear hopelessly weak might have been proved. The facts are as follows:—On the 15th of January 1895, the complainant gave certain orders to his employés. Several of them resented his orders, and when the complainant struck one of them, they joined in a threatening attack upon him. They were pacified, but again returned to the charge with stones and sticks and one of them had a gun. Further violence was threatened at night, to escape which the complainant went off to Mercara and lodged a complaint. The District police inquired and this inquiry had hardly ended by 1-30 p. m. on the 17th January. The part of the Superintendent of Police in the enquiry

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was then ended: and, as District Magistrate, he took up the case in his Court without any interval of delay. No doubt the previous inquiries were conducted by his subordinates, but he tried the case and convicted the accused sentencing them to very heavy sentences.

Now it is perhaps inevitable that the two functions of District Superintendent of Police and Magistrate should be combined in one officer in Coorg, and there is nothing to show that the Magistrate took, as Superintendent of Police, a direct part in the police inquiry or in any way allowed himself to be prejudiced by the action of his subordinate police when he sat as Magistrate. Nor does the court consider that he was prejudiced; but, where the Magistrate is also, however nominally, the Superintendent of Police, a special obligation rests on him to act with such manifest deliberation and attention to the safeguards provided by law as to dissociate his magisterial from his executive action not merely in fact but even in appearance.

But this is the least part of the objections which suggest themselves. The charge was one of rioting, and the accused were convicted under s. 197. The complainant, who must have known his men, only identified accused 2 Rama Maistry, 3 Chinanga and 14 Maradan as having taken part in the riot. The 2nd witness identified none. The 3rd witness spoke to a particular act of accused No. 1, Chinna Maistry, in calling for his gun, and in general terms only identied the rest of the accused. He was not asked to state in respect of each one of them what part each took. The 4th witness gave similar evidence against accused No. 1 and added that he ordered a man to go and fetch his gun. He was never asked to say who that

man was, and for the rest he only in general terms identified them. The 5th witness states that accused No. 13, Soopan, brought the gun and the court would have done well to confirm this specific piece of evidence by asking other witnesses who brought the gun. The same witness states that when he recovered the gun it was wrested from him, and this suggested further questions as to the identity of the accused. Such inquiries were unfortunately not made, and the case was hurried through. The 6th witness gave evidence against accused Nos. 1 and 2.

The court then was content with a general vague identification of ten accused persons respecting whom no specific acts are alleged to convince the court that they were actually using force or had a common object with those who did use force. In all cases of rioting and unlawful assembly it is most desirable, in view of the difficulties of identification in time of excitement, to cross-examine the witnesses and obtain specific details. The complainant could only mention three rioters as identified by himself. The riot was not a single incident. It was divided into two, if not three acts. The case demanded a patient inquiry, and the accused should have been allowed time to obtain advice and consider their defence. To sum up, the personnel of the court, the nature of the offence charged and the incidents of the riot demanded a more than usually patient procedure, but the court conducted the trial with more than usual despatch.

It is especially noteworthy that the court did not proceed under s. 148, and the ugly incident of the gun must therefore be put on one side. The offence then resolves itself into one of rioting and it must be ad-

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mitted that the riot was aggravated. On the other hand the complainant admitted having struck a blow, and although the blow may have been struck in self-defence, the Magistrate ought, in my opinion, to have examined into the facts with some minuteness.

I see no reason to doubt the main facts against the accused Nos. 1, 2, 3, 13 and 14, but I cannot regard the vague and general assertion of some only of the witnesses that the rest of the accused were present, as constituting sufficient evidence against them of the offence of riot. In regard to the five rioters against whom evidence is forthcoming, the infliction of the maximum penalty appears to me excessive.

I must therefore reverse the findings and sentences in the cases of accused Nos. 4 Venkata, 5 Palani, son of Pechi, 6 Kodiya, 7 Chenveera, 8 Yenasi, 9 Kolande, 10 Perumal, 11 Shankara, 12 Palani, son of Kupe and 15 Palani, son of Kupe, resident of Satyamangala and order them to be discharged. I maintain the finding in regard to the rest of the accused but reduce the sentences as follows:—Accused Nos. 1 Chenna Maistri, 2 Rama Maistri, 3 Chinanga, 13 Soopan and 14 Maradan, to fifteen months' rigorous imprisonment.

Ten accused acquitted. Sentences of others reduced.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

April 18.

In re NATILU KUNJEE RAMAN (ACCUSED).*

Artificers' Act (XIII of 1859)—*Breach of Contract—Claim by accused—Criminal Procedure Code (Act X of* 1882) *ss.* 260. 414 *and* 438—*Summary trial—Appeal—Report by Commissioner on Magistrate's proceedings.*

Where a complaint was made under the Artificers' Act (XIII of

* Criminal Revision Petition No. 8 of 1895, against the order of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, in Criminal Appeal No. 10 of 1895.

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1859) that the accused, having received an advance of Rs. 100, had failed to perform a contract entered into by him and the Magistrate was asked to order him to perform the work or repay the Rs. 100. The Magistrate tried the case summarily. The accused pleaded that he had worked out his contract and that the complainant owed him Rs. 170. The complainant showed from his books that accused had received Rs. 2,078-0-0 whilst the value of the work done by him was put at Rs. 1,854-8-0, and the Magistrate ordered that the accused should pay the difference between these two sums (viz :—Rs. 223-8-0) or in default suffer three months' rigorous imprisonment, on appeal to the Sessions Court, that court held that s. 414 of the Criminal Procedure Code precluded an appeal; and it could not therefore interfere.

The Commissioner, however, who was judge of the Court of Sessions, reported the Magistrate's proceedings to the Judicial Commissioner, recommending that the finding and sentence be reversed.

The accused also presented a petition of revision to the Judicial Commissioner; and was released on bail pending its disposal.

Held, (1)—That Act XIII of 1859 provides for breach of contract committed wilfully and without lawful or reasonable excuse: and the sentence under it should be that the advance be repaid or the work contracted for be performed at the option of the complainant; and if the accused fail to comply with the order, sentence may be passed of imprisonment for 3 months or until the money be sooner repaid. But here there was no finding that the accused had wilfully or without lawful or reasonable excuse, evaded his contract. On the contrary, he had a *boná fide* claim of right and the sentence of the Magistrate was not in the terms of the Act. Instead of ordering the advance of Rs. 100 to be repaid or the work performed and directing imprisonment if the court's order were not obeyed, a sum of Rs. 223-8-0 was ordered to be repaid, which the complainant had not asked for, and three months' imprisonment was given. The finding and sentence were not according to law. (2)—The case was not one which should have been tried summarily; and (3)—notwithstanding the summary trial an appeal to the Sessions Court was not barred by the strict terms of s. 414 of the Criminal Procedure Code.

Further, the report by the Commissioner, which purported to be made under s. 438 of the Criminal Procedure Code was not regular. The report should have been signed by that officer as Sessions Judge and not as Commissioner. He was acting in a judicial capacity and not as an executive officer.

The facts were as follows:—Mr. Sullivan, owner of the

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Kitteri Betta Estate entered into a contract with Natilu Kunjee Raman on January 30, 1893, in consideration of an advance of Rs. 100 to fell, clear, burn, line, &c. his estate from February 20, 1893 to May 31, 1893, with a gang of twenty coolies. Mr. Sullivan on September 18, 1894, complained that the accused had failed to carry out his contract, and asked that he might be required to re-pay the advance of Rs. 100 or be made to perform the work. The District Magistrate tried the case summarily. The accused admitted the contract, but pleaded that he had worked out the contract, and added that he was owed a balance of Rs. 170. The complainant appears to have produced his accounts from which it appeared that in wages, etc. the accused had received Rs. 2,078 whilst the value of the work done was put at Rs. 1,854½. The details or nature of the transactions were not shewn. The balance against the accused was Rs. 223½, and the District Magistrate ordered that this sum, and not the sum of Rs. 100 claimed by the complainant in his complaint should be paid, in which case the accused would be released, or otherwise that he must suffer three months' rigorous imprisonment.

Upon appeal to the Sessions Judge, that officer in view of s. 414 of the Criminal Procedure Code, ruled that no appeal lay against a summary trial and he rejected the appeal. Thereon the accused applied to the court of the Judicial Commissioner as High Court to revise the sentence passed, but meanwhile the Commissioner of Coorg had reported the case to the Judicial Commissioner with a recommendation that the sentence be reversed.

Pending disposal of the revision the petitioner was released on bail by the revising court.

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The Order of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows:—

Three issues arise, *1stly*, whether the conviction is sound or should be reversed; *2ndly*, whether the case was one which should have been tried summarily; *3rdly*, whether the report of the Commissioner of Coorg, recommending the case should be reversed by this court is in order.

I deal with the 1st issue. The charge of offence laid and sworn to was a breach of contract, and the court was requested to get the advance of Rs. 100 repaid or the work performed according to the terms of the agreement. There is nothing on the record to show what work the complainant desired to have performed, and the Magistrate neither ordered the advance of Rs. 100 to be repaid nor ordered the accused to perform or get performed his work according to the terms of the agreement. The sentence passed was not then justified by s. 2 of Act XIII of 1859. In the next place the essence of the law is a breach of contract "wilful, or without a lawful or reasonable excuse," a neglect or refusal to perform or get performed a work according to the terms of the contract. Even in a summary trial the court must on the face of its order show that the charge and the finding amount to an offence, and there is not one word in the District Magistrate's sentence or proceeding which shows that he was satisfied that a wilful breach of contract had been committed. On the contrary he admits that "accused says, from accounts he kept, complainant owes him Rs. 170 for work performed." There was thus a *bonâ fide* claim of right on the part of the accused, and it was especially incumbent upon the

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Magistrate to show that he deliberately found that the accused wilfully or without reasonable excuse evaded his contract.

At this stage I pass over to the 2nd issue. Did a *bonâ fide* claim of right deprive the Magistrate of summary jurisdiction under s. 260 of the Criminal Procedure Code? It seems to me that the inquiry under the first part of the second section of Act XIII of 1859, is an inquiry of a special character which in most cases, and particularly where a counter-plea like that in this case was set up, requires to be conducted with much care and patience. It is obvious that the legislature in passing Act XIII of 1859 intended to proceed with caution. The ordinary operation of the Act was confined to the Presidency Towns, and when extended elsewhere an officer was to be specially appointed to exercise the powers. It is obvious that the discretion allowed by s. 260 of the Criminal Procedure Code was never intended to be exercised to defeat the expressed intentions of a special law or prejudice an accused person in respect of a charge of this sort in his defence or his remedies of appeal. The Sessions Judge has held that under s. 414 of the Criminal Procedure Code no appeal lay. I am unable to agree with him. Section 414 presumes first that the Magistrate is empowered to act under s. 260 and the appellate court must satisfy itself as to such power. On the second place the unappealable sentence must be of imprisonment not exceeding three months only, or of fine not exceeding 200 Rs., or of whipping only. In this case the sentence was a special one. In the first place it was an order which should have been one for

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payment of advance or performance of a contract. Then there was a sentence dependent on the order and really part of it. The case was therefore appealable, because the sentence was not one exclusively of the precise character defined in s. 414 of the Criminal Procedure Code. Section 415 in its care to provide against an appeal where an order to find security to keep the peace is imposed, shows how strictly ss. 413 and 414 were intended to be read. The Sessions Judge if he was unable with the aid of the Magistrate's finding to form an independent opinion as to the guilt of the accused might have acquitted him; and with the view he takes of the case as shown in his report he was bound to have acquitted. I find then that the case was not one which should have been tried summarily and that notwithstanding the summary trial an appeal to the Sessions Court was not barred by the strict terms of s. 414 of the Criminal Procedure Code.

As regards the 3rd issue I do not consider that the report dated April 13, 1895, by the Commissioner of Coorg, which purports to be made under s. 438 of the Criminal Procedure Code is regular. The report should have been signed by that officer as a Court of Sessions and not as Commissioner. He was acting in a judicial capacity not as an executive officer.

Upon the whole case, I must express my surprise that more pains were not taken by the District Magistrate to show that it was proved to "his satisfaction" that the accused had "wilfully and without reasonable or lawful excuse neglected or refused to perform the terms of his contract." I find no evidence on the proceedings to show that any offence was committed. I next find that whereas one charge was laid, the accus-

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ed has been convicted upon another charge. The charge alleged that an advance of Rs. 100 was due, the District Magistrate found that a balance on account of Rs. 223½ was due. Finally the law allowed the Magistrate to order repayment of the money advanced or performance of the contract ; and the District Magistrate ordered Rs. "223½ out of the monies advanced and for which he has done no work as he agreed to do in his deed of contract to be repaid with court costs:" and then sentenced the accused to three months' rigorous imprisonment. The proceedings do not show any justification for the order. The complainant requested according to law that the accused should be ordered to perform his work or repay Rs. 100. The option of the complainant contemplated by s. 2 as to the choice of remedies should have been recorded, and the Magistrate would then have seen that his order was not according to law, and consequently the penalty for non-compliance with the order should not have been enforced. Cases like the present raise the serious issue whether Act XIII of 1859 is not abused. I reverse the sentence and finding of the District Magistrate and acquit Natilu Kunjee Raman Maistri, of the offence under Act XIII of 1859 of which he was charged.

Finding and sentence reversed. Accused acquitted.

May 11.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

In re KONGETI POOVIA (ACCUSED).*

Transfer—Grounds—Criminal Procedure Code (Act X of 1882) *s.* 526—*Penal Code* (*Act XLV of* 1860). *ss.* 182 *and* 500.

On an application by accused, under s. 526 of the Criminal Pro-

*Criminal Miscellaneous Petition No. 10 of 1895, relating to Criminal Case No. 14 of 1895 of the Second Assistant Commissioner and First-class Magistrate of Coorg.

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cedure Code, for transfer of a case of Giving false information (Penal Code, s. 182) and Defamation (Penal Code, s. 500) on the grounds of alleged intimacy between the Magistrate and the complainant and antipathy of the former to the accused, *Held* that looking at the personal charges of unfairness, the vague grounds of comradeship with one party and alleged antipathy to the accused and the unsupported allegation that the Magistrate's evidence is required; looking also at the unusual safeguards which the law provides in charges of defamation or of offences that require sanction, the grounds brought forward were not sufficient to warrant a transfer.

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The Order of the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) was as follows :—

This Court is asked under s. 526 of the Criminal Procedure Code to transfer a case No. 14 of 1895 pending before the Court of Mr. M. Belliapa, First-class Magistrate, Coorg, in which K. Poovia is charged with an offence under ss. 182 and 500 of the Indian Penal Code to some other Magistrate or Court. The grounds alleged are :—i. That the Magistrate and complainant were at school together and are friends ; ii. that they once owned together a coffee estate ; iii. that the Magistrate is to be summoned as a witness to the fact that Bantra Ramana bought a garden from the complainant ; iv. that owing to a cause stated a misunderstanding exists between the petitioner and the Magistrate ; and v. that this was accentuated by the petitioner having summoned the Magistrate as a witness in another case.

It appears that K. Poovia the petitioner presented to the Commissioner of Coorg a petition in which he wrote " though it is difficult to prove that the land is purchased on account of Mr. Dinshaw, which is carried with such a deep careful consideration, all these facts go to show that the land is intended for him." Petitioner " apprehends that there may likely be a great

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contention by all powerful man in the person of your Honor's office Head Sheristadar to take forcibly wrongful possession." The Commissioner being a public servant and regarding this information as possibly false or perhaps as intended to injure his Head Sheristadar by order dated 24th April 1895 ordered his Head Sheristadar Mr. Dinshaw to prosecute the petitioner. An express sanction is required under s. 195 of the Criminal Procedure Code if the charge is an offence under s. 182 of the Indian Penal Code and when the court invoked proceeds to take cognizance of the offence it will rest with it to decide whether it has jurisdiction or not. I do not find that the Commissioner specified s. 182 of the Indian Penal Code whilst he did specify "libel" (? Defamation), being an offence for which s. 195 of the Criminal Procedure Code does not provide. I express no opinion as to whether sanction to prosecute under s. 182 has been legally given.

Assuming, for argument's sake, that the sanction is sufficient and proper, I have only to consider whether a fair and impartial trial can be had in the First-Class Magistrate's Court. The grounds alleged are personal to the First-class Magistrate, and I have to bear in mind the many safeguards in this case against an improper or unfair trial. The strongest ground alleged is that the evidence of the Magistrate is necessary, but it is obvious that the question whether Bantra Ramana bought a garden from the complainant Dinshaw can be proved or disproved without the Magistrate's evidence, and in fact the affidavit does not in the least attempt to show that the Magistrate's evidence is needed or that he knows anything about the trans-

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action. The transfer of the case would cause great inconvenience, and no suggestion is made that any other court in Coorg could with greater fairness take cognizance of the case.

Looking then at the personal charges of unfairness, the vague grounds of comradeship with one party and alleged antipathy to the accused and the unsupported allegation that the Magistrate's evidence is required; looking also at the unusual safeguards which the law provides in charges of defamation or of offences that require sanction, I am not prepared to intervene or to hold that sufficient grounds are proved for the transfer of this case. The petition must be rejected.

Application refused.

May 11.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

In re K. PONAPA (ACCUSED).*

Transfer—Grounds—Criminal Procedure Code (Act X of 1882), s. 526(a) and (e).

Application was made by an accused, under s. 526 of the Criminal Procedure Code, for transfer of a case on the grounds (1) that the magistrate had shown some avidity in taking the case on his own file when it was cognizable by a second-class magistrate; (2) that the magistrate had expressed himself in court at first in favour of the accused and then acted in a diametrically opposite manner and granted repeated adjournments to the prosecution; (3) that a pleader for the prosecution had visited the magistrate and the accused was charged a day or so after. *Held* that under s. 426(*a*) of the Criminal Procedure Code it would be impossible to order a transfer: but under s. 426(*e*) a transfer might be expedient. The question under that clause would be whether there were any circumstances which might reasonably lead the accused to believe that the magistrate had, to some entent, prejudged the case. But as the case is one which *primâ facie* raised doubts as to whether or not a crime had been committed, and the magistrate had so far acted according to law, it could not be held expedient to interrupt the ordinary

* Criminal Miscellaneous Petition No. 12 of 1895, relating to Criminal Case No, 33 of 1895 of the District Magistrate of Coorg.

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course of justice or weaken the confidence of the public in the courts of law by removing a case from the magistrate because the accused, whether from a guilty conscience, nervous temperament, or confidence in bazaar rumours or other causes, considered he might be prejudiced because on a certain day a certain pleader visited the magistrate and was then surmised to have said to him something or another.

Mr. *Evers* for the petitioner.

The Order of the Judicial Commissioner (W. Lee-Warner, Esq., C. S. I.) was as follows:—

The powers vested in this Court under s. 526 of the Criminal Procedure Code are undoubtedly large enough to cover every shade of expediency. But before this Court could exercise its power of transfer, it would necessarily require very strong grounds for transferring a case from the District Magistrate to another Court. What are the grounds? The first ground is that the District Magistrate showed some avidity in taking the case on his own file when it was cognizable by the Second-class Magistrate. As regards this, it must be observed that the case was not withdrawn or re-called from the Subordinate Magistrate; but merely taken up *ab initio* by the District Magistrate. In such a procedure this Court cannot assume that the District Magistrate showed a tendency to refuse a fair and impartial trial.

The second ground is the procedure of repeated adjournments and the statements made in Court by the District Magistrate who first expressed himself in favor of the accused and then acted in a diametrically opposite manner. As regards this, it appears that the case is evidently one of those on the border land of civil remedy and criminal prosecution, and if the District Magistrate has in the proceedings betrayed that

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inclination of the balance of his mind to this or that side, which in a doubtful case is not unusual, the presumption is rather in favor of impartiality than of partiality.

The third ground is the allegation that a certain pleader for the prosecution had visited the Magistrate between the 10th and 19th April. In answer to the Court as to what took place at the interviews referred to, Mr. Evers replied that "we do not know exactly what took place, but the rumour spread at once on the 18th that the accused would be charged on the 19th." As regards this I can only express my grave surprise that so vague an allegation should be used to support what is really a grave charge against a Magistrate of want of fairness and impartiality. It would be impossible for any Court in India to exercise its legitimate jurisdiction if superior Courts listened to bazaar rumour or treated as credible every suspicion or insinuation that proceeded from a corrupt mind.

Under s. 526(*a*) it would be impossible for me to order a transfer. The question however is whether a transfer is not expedient under s. 526(*e*). Looking at *In the matter of the Petition of J. Wilson*(1), I have only to consider whether there are circumstances which might reasonably lead the accused to believe that the District Magistrate had, to some extent, prejudged the case. In the Calcutta case referred to, the Magistrate was not justified in at once issuing a warrant when the case was a summons case. In the present case, which *primâ facie* raises doubts as to whether or not a crime has been committed, the District Magistrate has so far acted

(1) I. L. R. 18 Cal. 247.

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according to law, and I cannot hold it to be expedient to interrupt the ordinary course of justice, or weaken the confidence of the public in the Coorg Courts of law by removing a case from the District Magistrate, because the accused, whether from guilty conscience, nervous temperament, or confidence in bazaar rumours or other causes, considers that he must be prejudiced because on a certain day a pleader visited the District Magistrate and is supposed then to have said to him something or another.

An appeal will of course lie to the proper Court if the accused is convicted, but in the meanwhile I can only dismiss this application.

Application refused.

August 10.

Before W. Lee-Warner, Esq., C. S. I., Judicial Commissioner.

In re M. BELLIAPA AND K. GANAPATHI (ACCUSED).*

Forgery—Penal Code (Act XLV of 1860), *s.* 467—*Alteration of date—Intention—Presumption—Evidence.*

The date on an agreement under the Artificers' Act (XIII of 1895) had been evidently altered from "1894" to "1895". Warrants against the executants under the Act having been refused and the complaint dismissed, the magistrate, noticing the alteration, sent the complainant and the writer of the agreement to the District Magistrate, who convicted them of the offence of forgery under s. 467 of the Penal Code. The Sessions Judge having rejected an appeal; the Judicial Commissioner was applied to in revision; and it was *held* by him, that if there was sufficient evidence to establish the fact of the document not being genuine, there would not be much difficulty in presuming a dishonest or injurious intention certainly against the complainant under the Artificers' Act; (2) as the question of law, whether alteration of the document was dishonest or fraudulent, rested entirely upon questions of fact and the probative effect of evidence, the facts and evidence should be examined by the court on revision; (3) as the evidence to prove the document was not executed on the date it purported to have been, consisted of

* Criminal Revision Petition No. 17 of 1895, against the order of the District Magistrate of Coorg, in Criminal Case No. 87 of 1894.

weak statements and no absolute proof, a guilt could not be presumed which was not proved. On such a weak basis of fact, the appellate court could not be content with hypotheses and arguments which the Sessions Judge admits he could not follow; (4) there being no sufficient evidence to establish the fact of the falsehood of the document, the legal questions of fraudulent intention, dishonesty, and the other elements of forgery, could not be decided and therefore the conviction should be set aside.

The facts of the case were that M. Belliapa, produced a stamped instrument (*Ex. A*) purporting to be a memorandum of agreement executed on the 12th January 1894, between himself and five Yeravas, who agreed to work for him in consideration of an advance, or to suffer the penalty provided by Act XIII of 1859. The writer was one K. Ganapathi. The agreement was for a period from the 12th January 1894 to the end of January 1895. The year 1895 had evidently been altered from 1894. On the 17th July 1894, accordingly, Belliapa applied to the Subedar to issue warrants against the executants of the agreement under Act XIII of 1859. The Subedar suspected the document *Ex. A*, noticed the change of 1894 to 1895, took evidence and dismissed the complaint. He went further and under s. 476 of the Criminal Procedure Code, sent M. Belliapa and K. Ganapathi to the District Magistrate, who convicted them of forgery under s. 467 of the Indian Penal Code and sentenced them to one year's rigorous imprisonment apiece. The Sessions Judge rejected an appeal.

Application was then made to the Judicial Commissioner to exercise his revisional powers.

Mr. *Evers* for the petitioner.

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The following Order was passed by the Judicial Commissioner (W. LEE-WARNER, ESQ., C. S. I.) :—

The main ground of appeal is that s. 467 of the Indian Penal Code does not apply. Forgery, supposing that the document was not executed as it purports, is the making of a false document with intent to cause damage or injury to any person. Making a false document is dishonestly or fraudulently executing or altering a document. The act must be dishonest or fraudulent and injurious. It must be intended to cause wrongful gain or loss, but here there was no intention, it is urged, to hurt any one. If the year was altered from 1894 to 1895, it was done, as it is argued, to give effect to the intention of the parties or correct a slip of the pen. The whole agreement itself was moreover one to secure the work which the Yeravas were bound to give. My attention is called to the case of *Jan Mahomed and others* v. *The Queen-Empress* (1), but there is all the difference between a document not genuine confirming a title, and a document which would justify an application to a Court of Law to issue coercive process or punish a man. Again I am referred to the case of *Queen-Empress* v. *Horadhan*(2), in which a forged certificate was presented to the Registrar of the Calcutta University. With the utmost respect for the learned Judges of the Calcutta High Court, I am unable to follow the whole of that judgment, but even if I could,

(1) I. L. R. 10 Cal., 584.

(2) I. L. R. 19 Cal., 380.—[NOTE BY EDITOR]. This case was dissented from by the Allahabad Judges in *Queen-Empress* v. *Soshi Bhushan* (I. L. R. 15 All., 210). And both the Bombay High Court and the Madras High Court differed from the Calcutta decision in *Queen-Empress* v. *Ganesh Kanderao and another* (I. L. R. 13 Bom., 506) and *Queen-Empress* v. *Appasami* (I. L. R. 12 Mad., 151) respectively.

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I should again see in the application to the Subedar a direct consequence and a fulfilment of the primary object or intention with which the document *Ex. A* was drawn up. The Calcutta case referred to would therefore not be analogous.

Had I been convinced that *Ex. A* was proved not to be genuine, I should not have experienced much difficulty in presuming a dishonest and injurious intention certainly against accused No. 1. But when the question of law rests entirely upon the questions of fact and the more or less probative effect of the evidence, I must examine the evidence and the facts. For instance if the only change in the document was from 1894 to 1895 and if the document showed that the parties meant 1895, I should not regard the alteration as a forgery. But there are other matters to be considered.

In the present case I am bound to ask myself whether the conviction is in any degree supported by the evidence. Before I can decide whether the conditions of forgery are fulfilled, I must know whether the document is false. The two parties most interested practically admit it. Of the three witnesses alone upon whose evidence *Ex. A* is condemned, accused No. 1, the petition-writer, speaks only to the change of year. Accused No. 2, no doubt says that he attested it the day before his examination by the Subedar, and therefore in July and not in January, but he makes the fatal admission that the document was never read over to him, and that he is quite illiterate; and the 6th witness, Chodian Kotty Moplah, cannot even say who wrote the agreement "as I was busy." Throughout the evidence I find nothing proved

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against accused No. 2. I have admitted that in all probability the date 1894 was altered to 1895, and in view of the fact that these Yeravas had never before been made to sign such an agreement, I suspect the authenticity of *Ex. A.* I have no hesitation in saying that the Magistrate to whom application was made to take action upon the agreement under the Labour Contract Act, properly refused to issue process. But when the evidence to prove that *Ex. A* was not executed on the date it purports to have been, consists of the weak statements made above, I cannot presume a guilt which is not proved at all, and which the Yeravas themselves who are most interested do not assert. To what extent accused No. 2 was guilty of the alleged forgery the District Magistrate does not attempt to show. There is nothing to show what he gained by any fraudulent or dishonest act.

Upon such a weak basis of fact, I cannot be content with hypotheses and arguments which the Sessions Judge admits he cannot follow. In order to decide the legal questions that arise as to forgery and its elements, I must at least be sure that *Ex. A* is proved to be false. I find no sufficient evidence to establish on a criminal trial that conviction, and I therefore direct that the conviction by the District Magistrate be set aside and the accused M. Belliapa and K. Ganapathi be released.

Conviction set aside. Accused acquitted and released.

Before W. Mackworth Young, Esq., C. S. I., Judicial Commissioner.

Sept. 21.

In re P. BELLIAPA (ACCUSED).*

Cheating—Intention—Collusion.

To constitute the offence of cheating, there must be an intention

* Criminal Revision Petition No. 20 of 1895, against the order of the District Magistrate of Coorg, in Criminal Appeal No. 33 of 1895.

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present to cause damage or harm in body, mind, reputation, or property at the time the act of alleged cheating is committed. The existence of subsequent collusion between parties to the transaction would not establish the offence of cheating in respect of the original act.

Mr. *Evers* for the petitioner.

The Order of the Judicial Commissioner (W. MACKWORTH YOUNG, ESQ., C. S. I.) was as follows:—

In order to establish the offence of cheating, it is necessary that there should be the intention to cause damage or harm in body, mind, reputation or property at the time the act of alleged cheating is committed.

This is not clear in the present case. The "chit" or acknowledgment made out in the name of the accused's father-in-law was so made out by consent of the purchaser, who was thus fully aware of any risk he might run by allowing the substitution of the name of Manawati Nanjapa for that of P. Beriapa.

There may have been collusion between these persons afterwards, but that would not establish the offence of cheating in connection with the original act and the elucidation of the question whether there was or was not an independent transaction between the two persons, standing in the relation of father-in-law and son-in-law on the one hand and the complainant on the other is, in my opinion, one for decision by a Civil Court in the first instance.

Under s. 439 of the Criminal Procedure Code, I cancel the order of conviction and direct that the fine be refunded.

Conviction set aside. Fine refunded.

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ACTION FOR MALICIOUS PROSECUTION—*Malice—Good faith—Reasonable persuasion.*] Where a document having been executed on a date later than that it bore, was characterised, by reason of its being so antedated, a forgery contrived for the purpose of nullifying a deed executed in *M's* favour, and *M*, mainly on this ground, charged the maker *V* of the document with forgery, *held*, in an action for damages for malicious prosecution brought by the latter against *M*, that this fact alone could not give *M* a reasonable persuasion of the truth of his charge. He had no direct evidence of it worthy of the name, but acted solely on a belief supported by rumour and by his knowledge of the character of *V*. To justify an action for malicious prosecution it is necessary to show that the prosecution was launched by the complainant out of malice; and in order to establish malice, it is necessary to show that the complainant did not take reasonable care to inform himself of the truth, and did not honestly believe that the offence had been committed. The only question to be dealt with in such a case is the good faith of the defendant in bringing the charge, or in other words his reasonable persuasion of its truth, that he had reason for thinking and honestly did think that the offence charged had been committed and that by the plaintiff. As no matters were urged on the part of the defendant *M* forming a sufficient ground for reasonable persuasion on his part that a forgery had been committed, he was rightly held liable in damages to the plaintiff. N. MONAPA *v.* BRAHMIN MANJIA 316

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ADMISSION—*Rejection of documentary evidence—Evidence Act (I of 1872) s. 65(b) and s. 91, Ill. (e)—Contract Act (IX of 1872) s. 37—Civil Procedure Code (Act XIV of 1882) ss. 13 and 43—Res judicata—Admission in evidence of deposition taken in another suit.*] *C* and *P* owed money to *R*, and *C* gave him an order upon *P* for coffee, which *R* passed on to *M* who passed it on to *N*, to whom the coffee was delivered in accordance with the order. *R* sued *C* and *P* on their bond; but his suit was dismissed, as they had satisfied their obligation by giving the order on which *N* had obtained delivery of the coffee. *N* was then sued by *R* and admitted receipt of the coffee but alleged that he had paid the value of it to *R*. This defence was held not to be proved and a decree was passed against *N* for the value of the coffee, which decree was upheld in appeal. *N* then preferred a special appeal. *Held*, (1) that *N* having by his plea of payment and otherwise, admitted receipt of the coffee, the rejection of documentary evidence to show receipt was immaterial as such evidence was superfluous; (2) the alleged failure of *R* to obtain a decree against *N's* principal did not absolve *N* from liability in the present suit, which was not *res judicata* by reason of the former suit, which was on a different cause of action and against different parties from the present one; (3) the admission in evidence of statements *en bloc* made in another suit might be inconvenient, but as it did not prejudice the parties it was no reason for dismissing *R's* suit. NIRWANI SHETTY *v.* RANASHETTY-PUTAPA SHETTY 294

ADMISSION: *see* UNSTAMPED PROMISSORY NOTE 172

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ADOPTION—*Right of widow to adopt.*] A son, having died subsequent to his father, the widow of the latter adopted a son to the father, although the deceased's natural son was grown up and married at the time of his father's decease. *Held* that she had no power to so adopt. The inheritance descended from father to son and the latter having left a widow she only was competent to adopt a son for her own husband. KALA *v.* MADA 18

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ALTERATION OF DECREE—*Civil Procedure Code (Act XIV of 1882) ss. 206, 210 and 305.*] On an application by a judgment-debtor for postponement of sale of attached property, an order was made that time should be granted and the judgment-debtor should pay twelve per cent. interest on the decreed amount from date of the order, the decree providing for six per cent. interest only. *Held*, that the order was clearly one made under s. 305 of the Code of Civil Procedure and as s. 210 of the Code provides that no decree should be altered at the request of parties save as provided in that section (210) or s. 206 the order was *ultra vires* and could not effect an alteration of the decree. JOOGOWDA *v.* KUPAMA *alias* LAKSHMAMA 136

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AMENDMENT: *see* CIVIL PROCEDURE CODE 268

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" : *see* CRIMINAL " " 282

APPEAL: *see* LAND REVENUE CODE (MYSORE) 143

APPEAL BY DEFENDANT—*Liability of dismissed co-defendant to be made respondent.*] An absolved defendant cannot be made respondent by another defendant and be made liable to the plaintiff's claim as decreed against that other defendant. CHENDANDRA KAROOMBAYA *v.* SAVERPINTO AND OTHERS 305

APPEAL FROM ORDER REGARDING DISPOSAL OF PROPERTY: *see* CRIMINAL PROCEDURE CODE 251

APPEAL IN FORMA PAUPERIS—*Civil Procedure Code (Act XIV of* 1882*) ss.* 592 *and* 622—*Revision.*] Where a District Judge in rejecting an application to appeal *in formâ pauperis* stated that the decree appealed against ought to be confirmed, *held* there was no ground for revision of the order of rejection as the order made under s. 592 of the Civil Procedure Code was not defective in any particular. *In the matter of* VENKAT RAO 204

APPEAL TO DISTRICT JUDGE: *see* BANGALORE TOWN MUNICIPAL REGULATION, 1871 ss. 34, 58 and 78 205

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ARTIFICERS ACT—(*XIII of* 1859)—*Order for imprisonment in default—Giving time for repayment—Causality.*] Where a Magistrate, under the Artificers' Act (XIII of 1859), directed the balance of advance found due by the accused to be paid forthwith and ordered that in default of payment imprisonment should be undergone for three months or until the amount be sooner paid, *Held*, that the order directing imprisonment in anticipation of the money not being paid was irregular; but that there is nothing requiring time to be given when the order is for payment of money. *Further*, an order directing the money to be paid forthwith is not contrary to law. *Also*, as it was not pretended that the accused was prepared to pay the money, the irregularity in passing the anticipatory order for imprisonment was not material and should be enforced if payment had not been made. ABDUL GANI *v.* THE GOVERNMENT. 243

ARTIFICERS ACT—(*XIII of* 1859)—*Breach of Contract—Claim by accused—Criminal Procedure Code (Act X of* 1882*) ss.* 260, 414 *and* 438—*Summary trial—Appeal—Report by Commissioner on Magistrate's proceedings.*] Where a complaint was made under the Artificers' Act (XIII of 1859) that the accused, having received an advance of Rs. 100, had failed to perform a contract entered into by him and the Magistrate was asked to order him to perform the work or repay the Rs. 100. The Magistrate tried the case summarily. The accused pleaded that he had worked out his contract and that the complainant owed him Rs. 170. The complainant showed from his books that accused had received Rs. 2,078-0-0 whilst the value of the work done by him was put at Rs. 1,854-8-0, and the Magistrate ordered that the accused should pay the difference between these two sums (viz:—Rs. 223-8-0) or in default

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suffer three months' rigorous imprisonment. On appeal to the Sessions Court, that court held that s. 414 of the Criminal Procedure Code precluded an appeal; and it could not therefore interfere. The Commissioner, however, who was judge of the Court of Sessions, reported the Magistrate's proceedings to the Judicial Commissioner, recommending that the finding and sentence be reversed. The accused also presented a petition of revision to the Judicial Commissioner; and was released on bail pending its disposal. *Held*, (1)—That Act XIII of 1859 provides for breach of contract committed wilfully and without lawful or reasonable excuse: and the sentence under it should be that the advance be repaid or the work contracted for be performed at the option of the complainant: and if the accused fail to comply with the order, sentence may be passed of imprisonment for 3 months or until the money be sooner repaid. But here there was no finding that the accused had wilfully or without lawful or reasonable excuse, evaded his contract. On the contrary, he had a *bonâ fide* claim of right and the sentence of the Magistrate was not in the terms of the Act. Instead of ordering the advance of Rs. 100 to be repaid or the work performed and directing imprisonment if the court's order were not obeyed, a sum of Rs. 223-8-0 was ordered to be repaid, which the complainant had not asked for, and three months' imprisonment was given. The finding and sentence were not according to law. (2)—The case was not one which should have been tried summarily; and (3)—notwithstanding the summary trial an appeal to the Sessions Court was not barred by the strict terms of s. 414 of the Criminal Procedure Code. *Further*, the report by the Commissioner, which purported to be made under s. 438 of the Criminal Procedure Code was not regular. The report should have been signed by that officer as Sessions Judge and not as Commissioner. He was acting in a judicial capacity and not as an executive officer.—*In re* NATILU KUNJEE RAMAN 340

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BANGALORE HACKNEY CARRIAGE REGULATION (*I of* 1887)—*Horses in good condition—Carriage and harness in good repair and sound—Evidence.*] A hackney-carriage driver was said to have driven his cart for hire with loose wheels and used harness which was unserviceable. There was no charge or regular accusation made; and no clear admission of guilt: the only papers on the proceedings being a statement of the accused and the judgment. *Held* that the expressions "loose wheels" and "unserviceable harness" were too general and in the absence of any specific evidence as to the particulars in which the wheels were quite unsound and the harness perfectly useless, endangering the safety of the passengers, so as to bring the case within the Rules under the Hackney Carriage Regulation, the conviction was illegal.—*In the matter of* ISMAIL KHAN *v.* THE GOVERNMENT 227

BANGALORE TOWN MUNICIPAL REGULATION, 1871, *ss.* 34, 58 *and* 78—*License for retail-sale of foreign liquor—Mode of assessment—Appeal to District Judge.*] *Held*, that under the Municipal Regulation, the imposition of taxes has to be based on the income or profits of those liable to be taxed; and it is imperative on the Municipal President to make the classification required by the Regulation before demanding a particular rate from any particular person. *Also*, the fee for retail sale of foreign liquor is undoubtedly a tax upon the sale of spirituous and intoxicating

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liquors within the meaning of s. 34 and other sections of the Regulations, and not merely a registration fee. An appeal against the assessment therefore lay to the District Court.—SINGARAVELU MUDALIAR v. THE PRESIDENT, MUNICIPAL COMMISSION, BANGALORE CITY ... 205

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CHEATING—*Intention—Collusion.*] To constitute the offence of cheating, there must be an intention present to cause damage or harm in body, mind, reputation, or property at the time the act of alleged cheating is committed. The existence of subsequent collusion between parties to the transaction would not establish the offence of cheating in respect of the original act.—*In re* P. BELLIAPA 356

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CIVIL COURTS REGULATION (*No I of* 1883), *s.* 16—*Mofussil Small Cause Courts Act* (*XI of* 1865), *s.* 20—*Small Cause Court—Execution of decree against immovable property.*] The Court of a Sub-Judge invested with Small Cause jurisdiction under s. 16 of the Civil Courts Regulation, No. I of 1883, is the proper court to execute a decree passed by it as such Small Cause Court for a sum not exceeding Rs. 100 when execution is sought to be effected by attachment and sale of immovable property.—HANUMIA v. BOMIA 215

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *s.* 32—*Removal of defendants' names after the first hearing.*] An order was made after the first hearing of a suit for the removal of certain defendants' names from the record. *Held*, that this could not have been an order under s. 32 of the Civil Procedure Code as that section authorises such order being made only "on or before the first hearing," and consequently it was not appealable under clause 2 of s. 588. The court below acted illegally in making such an order, as there is no provision of law authorising the removal of a defendant's name from a suit after the first hearing. The Chief Court therefore interfered under s. 622 of the Civil Procedure Code and set aside the order.—SIDNEY SMITH v. B. A. BRITO 197

CIVIL PROCEDURE CODE (*Act XIV of* 1882), *s.* 45—*Dismissal of suit—Discretion.*] Where a suit had been dismissed under s. 45 of the Civil Procedure Code, in order that the plaintiff might proceed in another way more in accordance with law, *Held*, by the Resident's Court, that the section gives a wide discretion to the court to arrest at an early stage litigation that is proceeding on a wrong basis and must prove infructuous; and as it did not appear the discretion had been exercised

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against the interests of the parties or of justice, it should not be interfered with.—DULLA LAUL v. GUFFUR KHAN 269

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *ss.* 98, 99 *and* 157—*Non-appearance of parties—Dismissal of suit—Appeal.*] After settlement of issues, on the date fixed for final hearing, the parties failed to appear and the court dismissed the suit. *Held*, that the order was one made under s. 157 of the Civil Procedure Code and therefore appealable as a decree to the Chief Court. Sessions 98 and 99 of the Code were not applicable, as issues had been framed and the suit proceeded to final hearing. *Also*, although it was perhaps an irregularity that the appeal was admitted as a Miscellaneous and not a Regular Appeal, that did not affect the powers of the court or its competency to reverse the order appealed against.—KEMBADURIA v. SAMBIA 174

CIVIL PROCEDURE CODE (*Act XIV of* 1882), *s.* 206—*Conformity of decree with judgment—Amendment.*] On an application to amend a decree eight years old in order to bring it into alleged conformity with the judgment under s. 206 of the Code of Civil Procedure, the judge recorded "I am not prepared to say that the judge who passed the judgment did not intend to give the counter-petitioner the remedy which the decree gives her." *Held*, that, as the section only requires amendment to be made "If the decree is found to be at variance with the judgment, &c.," the judge was right in rejecting the application, as he was not satisfied such variance existed.—NAGALINGA SHETTY v. MOOTHOO SHETTY 268

CIVIL PROCEDURE CODE (*Act XIV of* 1882), *s.* 244—*Representative of judgment-debtor—Purchaser at court-sale.*] A purchaser at court-sale of the equity of redemption of a judgment-debtor is not the latter's representative under s. 244 of the Civil Procedure Code; and is not barred from bringing a separate suit to enforce his claims.—K. SRINIVASA IYENGAR v. SUBRAMANYA SOMAYAJE 29

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *ss.* 311 *and* 313—*Decree-holder—Purchaser—Setting-aside execution sale—Costs.*] At a sale of immovable property in execution of a decree held by the *S. Bank*, the purchaser was the holder of another decree against the same judgment-debtor and entitled to rateable distribution. He subsequently made application to have the sale set aside on the grounds (1) that the judgment-debtor possessed no interest in the property and (2) that he had been imposed on by the misrepresentations of the Agent of the *S. Bank*. *Held* that the application must be regarded as made under either s. 311 or s. 313 of the Civil Procedure Code. If under s. 313, the applicant being considered as purchaser only, it must be dismissed because it was found as a fact that the judgment-debtor had a substantial interest in the property sold. If under s. 311, the applicant being considered as decree-holder, it could not be said that he had sustained substantial injury by a larger sum having been obtained for the property by reason of any assumed irregularity in publishing the sale, than might otherwise have been obtained; and as the section enacts that a sale shall not be set aside at the instance of a decree-holder if he has not sustained substantial injury, the application must also be dismissed under that section.—THE SRINIVASA BANK, v. APPU RAO 179

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *s.* 335—*Obstruction to possession—Insolvency.*] A decree-holder on a mortgage, having proved in the insolvency of his debtor, an order was passed in the insolvency proceedings that "upon application to be made on that behalf the property may be sold and out of the sale proceeds the mortgagee will first be

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paid." The property was then sold under the decree and on the purchaser (decree-holder) seeking possession he was obstructed by the assignee from a brother of the insolvent, who had also been a party to the suit in which the decree had been passed. *Held*, that the order in the insolvency proceedings was quite sufficient to validate the sale; and more especially as the obstructor was neither the insolvent nor the assignee of any interest of the insolvent nor a scheduled creditor, but a mortgagee who derived his interest from a brother of the insolvent—which brother was also a party to the suit; and as further, the assignment was found to have been made without consideration, for the express purpose of defeating the decree and while the property was under attachment for the decree debt.—VENKATA SUBIA *v.* GURUSANTIA ... 185

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *s.* 336—*Time allowed for application to be declared insolvent—Mutchalika.*] Although a *mutchalika* specifies thirty days as the time within which a judgment-debtor is to file his application to be declared insolvent, his surety is not liable if the application is filed within a month, that being the time allowed by law.—KAVATI RANGAPA *v.* CHENA BASAPA 162

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *s.* 373—*Withdrawal of suit with liberty to bring a fresh one—Grounds for such order—Ignorance—Minority.*] After settlement of issues and the adjournment of final hearing, the plaintiffs were permitted to withdraw the suit with liberty to bring a fresh one because "their pleader represented that plaintiff No. 1 was an ignorant man and it would be well to allow plaintiff No. 2 to sue after he had attained his majority." *Held*, that the ignorance of the first plaintiff was no ground for the order and as to the alleged minority of the second plaintiff it was not a valid ground and the statement that he was a minor could not be right as it was one of the points for trial.—DASA *v.* CHENA THIMA 199

CIVIL PROCEDURE CODE (*Act XIV of* 1882) *Chapter XX—Insolvent Judgment-debtor—Surety—Discharge.*] The surety for a judgment-debtor, under s. 349 of the Code of Civil Procedure (Chapter XX) is discharged from his obligation when the judgment-debtor applies to be declared insolvent or when his application is rejected after his appearance.—LALKHAN *v.* MR. WILLIAM JOHNSON 267

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COORG REVENUE CODE, *s.* 53—*Sale of land for arrears of revenue—Freedom from encumbrance—Fraud—Collusion.*] *D* and *B* jointly owned immovable property. *D* mortgaged his share (one-third) to *I* as security for moneys borrowed: and some ten years afterwards the whole property

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was put up to auction for arrears of revenue and bought for a few rupees over the arrears for *M*, the eldest son of *B*. There was then some dispute and litigation between *D* and *M* as to whether the purchase at auction was for the benefit of the latter only or for the benefit of all the joint owners and ultimately *D* was declared owner of one-third of the property. *D* thereupon abandoned his right to *M*. In a suit by *I* to enforce his mortgage, making *D* and *M* defendants, it was urged that under the Coorg Revenue Code, s. 53, the purchase at auction-sale for arrears of revenue gave the purchaser a title free from encumbrances, and *ipso facto* annulled *I's* mortgage: that the whole property was vested in *M* and he therefore held it clear of all incumbrances. It was found by the District Judge that *D* and *M* were not in collusion to defraud *I* although *M* "seeing his chance let the property go up for sale and bought it, thereby securing an undoubted title to the whole estate." *Held*, that this was equivalent to finding that *M* "knowingly became a defaulter together with *D* in order that the estate might be put up to auction for arrears of revenue and then paid for it something more than the arrears on the whole estate and secured a title free from encumbrance." *Further*, that the action of *M* in knowingly falling into arrears and getting the estate put up to auction was fraudulent and that as *D* was his co-sharer and the auction was brought about in his interests, he was party to the fraud. Both were defaulters and they must not be permitted to benefit by their own fraud. *Therefore*, notwithstanding s. 53 of the Coorg Revenue Code, the payment of the auction-price by one of the defaulters did not convey to him a title to the estate free of all encumbrances but that after the auction the estate was liable as security for the debt of *D* to *I* to the extent of the former's share.—BIDANDRA IYANA *v.* ICHETTI DEVIA ... 306

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CRIMINAL PROCEDURE CODE (*Act X of* 1882) *s.* 42—*Duty to aid Police—Demand of aid.*] A duty is imposed on the public by s. 42 of the Criminal Procedure Code of aiding the Police only when aid is reasonably demanded. If there was no demand there could be no breach of duty and a conviction in such case was improper.—*In the matter of* ERANA *v.* THE GOVERNMENT 229

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *ss.* 118, 124 *and* 406—*Security for good behaviour—Appeal.*]. A person ordered by a Magistrate other than the District Magistrate to give security for good behaviour can appeal from such order to the District Magistrate. He mistakes his remedy if he resorts to the Sessions Court.—THE QUEEN-EMPRESS *v.* VALABEE 282

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *ss.* 203 *and* 204—*Dismissal of complaint—Acquittal.*] Where a Magistrate having issued summons under s. 204 of the Criminal Procedure Code, examined only the complainant and the accused and, without examining the remaining witnesses for the prosecution, acquitted the accused and dismissed the complaint. *Held*, that, having taken cognizance of the offence under

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s. 204 of the Criminal Procedure Code, the Magistrate had no power to dismiss the complaint under s. 203 of the Code. *Also*, that the order of acquittal was wrong, as he did not examine the complainant's witnesses.—*In the matter of* ABDUL KHADUR SAB *v.* THE GOVERNMENT ... 242

CRIMINAL PROCEDURE CODE (*Act X of* 1882), *ss.* 240 *and* 494.—*Withdrawal of charges—Proper course where s. 494 will not avail.*] Section 240 of the Criminal Procedure Code applies only to remaining charges forming part of the same trial or case in which a conviction has been already made upon another charge with which they had been united. In a trial on a single charge, the procedure for its withdrawal is laid down in s. 494 of the Code; and where that section is not applicable, the proper course is either to convict or acquit; and in case of conviction, the magistrate may exercise his discretion as to passing a nominal sentence.—THE QUEEN-EMPRESS *v.* COOPOOSAMY 283

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *ss.* 247 *and* 403—*Effect of acquittal.*] An order under s. 247 of the Criminal Procedure Code is one of acquittal and the person so acquitted cannot, by s. 403 of the same Code, be again prosecuted or retried for the same offence.—*In the matter of* RAYAPA KAMATHI *v.* THE GOVERNMENT 243

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *ss.* 331, 519, 545—*Compensation to witness—Power of Magistrate in awarding imprisonment in default.*] If money is taken out of the possession of a prisoner at the time of his arrest, compensation may be paid thereout to an innocent purchaser under s. 579 of the Criminal Procedure Code; but there is no authority for, and s. 545 of the Code does not authorise payment of, compensation out of fine to a witness in the case. *Also*: a magistrate who has power to award six months' imprisonment for an offence cannot award more than one-fourth of that period or one and a half month's imprisonment in default of payment of fine.—*In the matter of* KUDLI *v.* THE GOVERNMENT 238

CRIMINAL PROCEDUE CODE (*Act X of* 1882) *s.* 488—*Maintenance—Compromise—Powers of magistrate—Procedure.*] A wife having sought an order for maintenance against her husband under s. 488 of the Criminal Procedure Code, entered into a compromise with him whereby he was (1) to pay her an annual allowance, the first payment to be made on a future date, (2) to give her certain brass utensils and, (3) to provide her with a dwelling-house. *Held*, that the magistrate had no power to compel a husband to give his wife kitchen or other utensils or to provide her with a dwelling-house and in making an order to that effect he usurped the functions of a civil court. *Also, quære*, whether he could make an order for an annual allowance to commence from a future date as the section only empowers a criminal court to order a person "to make a monthly allowance" and that "payable from the date of the order". The proper procedure in case of such a compromise would be for the compromise to be recorded, though it could not be enforced, and to dismiss the wife's petition unless an agreement were entered into that might be enforced by a criminal court.—*In the matter of* RAMAY GOWDA *v.* THE GOVERNMENT 231

CRIMINAL PROCEDURE CODE (*Act X of* 1882) s. 488—*Maintenance—Refusal by husband to maintain wife—Frivolous excuse by husband.*] *B* left *A* her husband's house, with his permission to visit her mother who was ill: and she subsequently filed a complaint before the magistrate that when she requested *A* to take her back to his house, he refused to do so calling her a thief and threatening to beat her, and therefore she sought maintenance under s. 488 of the Criminal Procedure Code. Be-

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fore the magistrate, *A* answered that he was willing to take *B* back if his caste people all consented to it. *Held* by the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) that such a conditional offer was on the face of it a mere frivolous excuse, and tantamount to a refusal by *A* to maintain his wife especially in the face of the magistrate's finding that the accusations made by *A* against *B* were wholly without foundation. The award of maintenance by the magistrate was therefore a very proper and legal one. *Per* RAMACHENDRA IYER J.—*B* did not allege that *A* had driven her away from his house, and that she was compelled to live separately from him. When she was voluntarily living away from *A* he was not bound to give her separate maintenance. She did not offer to return to *A* and he did not refuse to maintain her, so there was neither neglect nor refusal. There was no foundation for her application; and she was not entitled to relief because *A* did not prove that she was disentitled to separate maintenance.—*In the matter of* ANAYA *v.* THE GOVERNMENT. 246

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *s.* 518 *and s.* 520—*Restitution of property—Power of appellate court to order restitution of property handed over by subordinate court—Duty of subordinate court to stay its hand pending time of appeal—Appeal from order regarding disposal of property—Powers and duties of criminal courts regarding disposal of property.*] If the interference of a court of criminal appeal is needed to protect a person entitled to possession of property it must be invoked before the property has passed out of the control of the court below. The order which may be passed under s. 520 of the Criminal Procedure Code is one which may modify, alter or annul an order regarding the disposal of property and there is no power to order restitution. A claimant aggrieved by the order of a subordinate magistrate may maintain an action for the property or for damages. Section 518 requires the courts in appealable cases to suspend the execution of any order as to possession until the period for presenting such appeal has passed: and mischievous consequences may ensue if they act in a precipitate way in disregard of the provisions of the section, especially as there may be no appeal from a conviction but yet an appeal may be brought from an order passed by a judge regarding the disposal of property. *Further*—A criminal court has no power to pass an order respecting the disposal of property unless it finds that an offence appears to have been committed regarding it, or that it has been used for the commission of an offence. When the court arrives at neither of these findings, the property should ordinarily be delivered to the person by whom it has been produced; and where it has been produced by the police, it should ordinarily be returned by the police to the person out of whose possession they have taken it. If, however, there exists a *bonâ fide* doubt as to the ownership and a person other than the person from whose possession the property is taken makes a claim for it, a magistrate may impose conditions on the person to whom it is delivered in order that it or the value of it may be forthcoming in case the rival claimant establishes a title to it.—*In the matter of* THE GOVERNMENT *v.* IRAPA 251

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *s.* 522—*Restoration of immoveable property.*] To support an order under s. 522 of the Criminal Procedure Code, a finding that criminal force was used is necessary; and if dispossession did not result from criminal force, the section has no application.—THIRUMALA GOWDA *v.* LINGANA 250

CRIMINAL PROCEDURE CODE (*Act X of* 1882) *s.* 560—*Compensation to accused—Absence of evidence.*] Compensation to an accused under s. 560 of

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the Criminal Procedure Code can only be awarded when the Magistrate is satisfied the accusation was frivolous or vexatious. Where the complainant was absent and accused was acquitted for default of evidence it could not be inferred that such was the case.—*In the matter of* JIBRA v. THE GOVERNMENT 230

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DAMNUM—*Injuria—Right of action—Official acts—Error of judgment.*] A sluice which brought water to a field was removed by the Executive Engineer of the Division and a three-inch pipe substituted which was insufficient for the irrigation of the field. It was not alleged that the Executive Engineer was actuated by any corrupt or unworthy motives, but only that he had committed an error of judgment which he subsequently admitted and corrected, after damage had been sustained by the owner of the field. *Held*, that there was no legal cause of action against the Engineer. A land-owner is not entitled to the services of an Executive Engineer for the purpose of providing an adequate supply of water for his field. He is appointed by the State and while acting within the province assigned to him is responsible to the State alone for any abuse of the powers it has conferred on him.—KARVE v. RAMANUJA IYENGAR 25

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DECREE IN FAVOR OF DEFENDANT NOT PARTY TO RAZINAMA: *see* SUIT FOR DIVISION OF FAMILY PROPERTY 155

DEFAMATION—*Cause of action—Special damage—Distinction between libel and slander—Privilege—Parties.*] In a suit for damages for slander alleged to have been uttered before a caste *panchayet*, *held* that the English law of slander as forming part of the law of defamation and as such drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage is not applicable to this country, and mere defamatory words are actionable without proof of special damage. *Also*, both parties should be allowed to adduce such evidence as they might wish to offer to prove the circumstances under which and the occasion on which the alleged defamatory language was used, and the order remanding the case for disposal on the merits was right. *Semble* there should have been separate suits against each of the defendants and not one suit against all jointly.—LINGOJI *v.* TULAJAPA. 138

DEFAMATION—*Publication of rumours—Good faith—Indian Penal Code (Act XLV of 1860) s. 52.*] The mere fact that a person heard from others statements prejudicial to a third party is no justification for his publishing such information without taking care to ascertain its truth. Under s. 52 of the Indian Penal Code, nothing is said to be done or believed in good faith unless it be done with due care and attention.—MALAPA *v.* THE GOVERNMENT. 217

DEFAMATION—*Privilege—Judicial proceeding—Criminal Procedure Code (Act X of 1882) s. 4.*] A complaint having been filed in the Court of a Magistrate, was by him referred to the police for enquiry and, during the investigation by the police, petitions were presented, containing alleged defamatory matter in respect of which suit was brought. *Held* that, although at the time the petitions were presented the case was in the hands of the police and no judicial procedure was actually going on, yet as a complaint had been filed before the magistrate, it was competent to him to take evidence at any time after such filing: and therefore looking at the definition of "judicial proceeding" given in s. 4 of the Criminal Procedure Code—"any proceeding in the course of which evidence is or legally may be taken"—the petitions must be considered as having been presented in the course of a judicial proceeding and the statements made therein to be privileged. The judicial proceeding initiated by the complainant was not interrupted in consequence of the investigation ordered by the magistrate; nor were the petitions made in the course of the investigation alone. They were made with reference to and in the course of the judicial proceeding instituted before the magistrate by the complainant.—K. SUBBIA *v.* N. MONAPA. ... 313

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DISTRICT MAGISTRATE ALSO ACTING AS SUPERINTENDENT OF POLICE—*Conduct when trying cases enquired into by his police subordinates—Identification—Conclusive evidence—Excessive punishment.*] A case of riot was enquired into by the Police; and the District Magistrate, who was also Superintendent of Police, took up the case in his court without any interval of delay. He tried the case and convicted the accused, sentencing them to very heavy sentences. It appeared that he was content with a general vague identification of accused persons, against whom no specific acts were alleged to convince the court that they were actually using force or had a common object with those who did use force; and the trial was altogether conducted in a hasty and perfunctory manner. *Held*, that although it was perhaps inevitable that the two functions of District Superintendent of Police and District Magistrate should be combined in one officer, and there was nothing to shew that the Magistrate took, as Superintendent of Police, a direct part in the police inquiry or in any way allowed himself to be prejudiced by the action of his subordinate police when he sat as Magistrate, yet, where the Magistrate is also, however nominally, the Superintendent of Police, a special obligation rests on him to act with such manifest deliberation and attention to the safeguards provided by law as to dissociate his magisterial from his executive action not merely in fact, but even in appearance. In all cases of rioting and unlawful assembly it is most desirable, in view of the difficulties of identification in time of excitement, to cross-examine the witnesses and obtain specific details. Such a case as the present demanded a patient inquiry and time should have been allowed to the accused to obtain advice and consider their defence. Considering therefore, the personnel of the court, the nature of the offence charged and the incidents of the riot, a more than usually patient procedure was demanded, and the facts ought to have been examined with some minuteness; but the Magistrate conducted the trial with more than usual despatch, and this was to the undoubted prejudice of the accused, against the majority of whom there was no sufficient evidence, while in regard to those against whom evidence was forthcoming, the infliction of the maximum penalty was excessive.—*In re* CHENNA MAISTRY 336

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DUTY OF SUBORDINATE COURT TO STAY ITS HANDS PENDING TIME OF APPEAL : *see* CRIMINAL PROCEDURE CODE 251

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EFFECT OF ACQUITTAL : *see* CRIMINAL PROCEDURE CODE 243

EJECTMENT—*Title in plaintiff—Onus—Consideration.*] A suit for ejectment cannot be brought by one who has no valid title to the land in dispute; and an issue on this point should be framed in such a case. *Also*, if a conveyance operates as a *bonâ fide* transfer of property it does not cease to be valid because consideration was not paid wholly or partially. The fact of payment or non-payment can only be considered for the purpose of determining whether there was a sale.—THIRTHA CHARI *v.* DODA BOMANI GOWDA 17

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EJECTMENT—*Title—Lease—Questions for decision.*] In a suit for ejectment and arrears of rent, against a tenant who was alleged to be holding over, the latter denied the tenancy and said he had purchased the property from a third party who was added as an additional defendant. The court of first instance found that the plaintiff's purchase of the land was good and that the tenancy existed as alleged; but that the conveyance set up by the defendant was fraudulent, and decreed the claim. On appeal, the District Court considered that the lease set up in the plaint was not true and ordered dismissal of the suit without going into any other questions. *Held*, by the Chief Court, that the suit being for ejectment the question at issue was one of title; the lease was only one of several allegations made by the landlord to show he was owner and entitled to immediate possession. It being necessary for the question of title to be decided, the appeal was remanded for that purpose.—GURUNANJIA *v.* MALALI BASAPA 32

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EXCISE REGULATION, s. 38—*Cultivation of hemp plants—Presumption.*] Where two hemp plants were found growing in the accused's garden but there was no evidence to rebut the plea of the accused that they grew spontaneously. *Held* that under the Excise Regulation, *s.* 38, no conviction could be had in the absence of any evidence, direct or inferential, that the accused cultivated the plants, and the Magistrate was wrong in presuming they had been raised by cultivation.—*In the matter of* SANAMALIA *v.* THE GOVERNMENT. 237

EXCISE REGULATION (*III of* 1885) *s.* 39 *and s.* 42—*Sale of toddy contrary to conditions of license—Conviction under wrong section—Evidence.*] Where a license-holder sold toddy at the foot of a tree contrary to one of the conditions of the license, the conviction should be under s. 42 of the Excise Regulation of an offence punishable by fine only; not under s. 39, the offence under which is punishable by imprisonment. As, however, the accused had undergone a portion of the sentence of imprisonment wrongly imposed by the Magistrate on a conviction under the wrong section, the Chief Court declined to pass a fresh sentence or fine under the right section; but cancelled the remainder of the sentence inflicted. *Held* also, that as the finding of the Magistrate was based upon some evidence the court, as a court of revision, were bound to accept it. *In the matter of* THE GOVERNMENT *v.* APANA 256

EXECUTION—*Order for abatement—Limitation—Limitation Act* (*XV of* 1877), *s.* 14 *and Arts.* 178 *and* 179.] Seven parcels of land were attached and claims made in respect of two only of them but the court made a order in respect of the remaining five, "to abate, pending disposal of the claim." The claims having been disposed of, another application for execution was made within three years of such

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disposal but beyond three years from the date of the abatement order. *Held* that, if s. 14 of the Limitation Act be taken as applicable to proceedings in execution, the period occupied in disposing of the claims might be excluded and the latter application for execution would therefore be within the three years prescribed by Art. 179 of the Limitation Act. *Further*, that, apart from the applicability of s. 14 of the Limitation Act, the action of the court in suspending further proceedings by the abatement order, though not contemplated by any of the provisions of the Civil Procedure Code relating to execution, continued attachment of all the property pending disposal of the claims and had the effect of keeping the decree alive till the date of such disposal, from which the decree-holder had a fresh starting point of limitation. *Per* RAMACHENDRA IYER, *J.*—The property was under attachment and there was no order to cancel the attachment or deny the right of the decree-holder to execute his decree. There was no occasion for a second application, as the first was still subsisting and what was needed was that some steps should be taken in continuance of it. * * * In substance, the application was one under Art. 178 and was within time as it was filed within three years from the date when the right to apply accrued, *i, e.*, when order on the claims was passed.—NANJUNDA SASTRY *v.* ASWATHA NARAINA SASTRY 149

EXECUTION—*Attachment of monies in hands of public officer.*] Where monies belonging to a judgment-debtor or which might be applied towards satisfaction of decrees against him had come to the hands of the Deputy Commissioner of *B* and the Amildar of *N*, an application for execution by attachment of such monies should not be rejected summarily, or without enquiry as to whether the estate of the judgment-debtor was not capable of attachment.—GOPA SETTY *v.* SRI SUBRAMANYA SACHIDANANDA BARATISWAMI 173

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FAILURE OF PARTIES TO PRODUCE EVIDENCE ON DATE OF HEARING—*Disposal of suit—Adjournment—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 157, 158—*Court-fee.*] On the date fixed for hearing of a suit, both parties were represented by pleaders but neither had their witnesses in attendance and an application by the plaintiff for adjournment was not opposed by the defendant. The Subordinate Judge thereupon dismissed the suit remarking that the plaintiff had failed to prove the issues and substantiate his claim. On appeal the District Court treated the order as one under s. 157 of the Civil Procedure Code and remanded the case for decision on its merits after taking the evidence offered by the parties. *Held* by the Chief Court that the order of the Subordinate Judge was not one under s. 157 but under s. 158 of the Civil Procedure Code and under the circumstances the plaintiff was entitled to consideration. The ends of justice were met by the order of remand passed by the District Judge which was therefore confirmed with costs against the plaintiff. *Also*, the appeal to the District Court was wrongly treated as a miscellaneous appeal; and as it was rightly brought on the full court-fee, the difference of stamp-duty refunded by order of the District Court must be recovered from the plaintiff.—BALE APANA SETTY *alais* CHANA BASAPA SETTY *v.* SALAR MOHADEEN 158

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" INFORMATION: *see* PENAL CODE 329
" PERSONATION: *see* REGISTRATION ACT 234

FAMILY DEBT—*Decree against father—Liability of sons—Partition subsequent to decree—Fraud—Proof.*] *A* having obtained a money decree against *B* sought to execute it against property which had fallen to the share of *B's* sons on a partition made between them and their father subsequent to the decree. *Held*, that it was not proved the debt was contracted for family or necessary purposes. A head of a family owes a debt to the members of his family who have a right to claim their share in the property and a partition of family property after a decree for debt does not necessarily imply fraud. If the decree-holder wants to pursue property no longer held entirely by his judgment-debtor, he must prove that its present holders shared the benefit of the debt incurred and consequently the onus of satisfying the decree involving their participation in the benefits of the debt. This must moreover be established by more than an inference.—SUBIAH *v.* IYANA... 286

FORGERY—*Penal Code (Act XLV of* 1860), *s.* 467—*Alteration of date—Intention—Presumption—Evidence.*] The date on an agreement under the Artificers' Act (XIII of 1895) had been evidently altered from "1894" to "1895". Warrants against the executants under the Act having been refused and the complaint dismissed, the magistrate, noticing the alteration, sent the complainant and the writer of the agreement to the District Magistrate, who convicted them of the offence of forgery under s. 467 of the Penal Code. The Sessions Judge having rejected an appeal; the Judicial Commissioner was applied to in revision; and it was *held* by him, that if there was sufficient evidence to establish the fact of the document not being genuine, there would not be much difficulty in presuming a dishonest or injurious intention certainly against the complainant under the Artificers' Act; (2) as the question of law, whether alteration of the document was dishonest or fraudulent, rested entirely upon questions of fact and the probative effect of evidence, the facts and evidence should be examined by the court on revision; (3) as the evidence to prove the document was not executed on the date it purported to have been, consisted of weak statements and no absolute proof, a guilt could not be presumed which was not proved. On such a weak basis of fact, the appellate court could not be content with hypotheses and arguments which the Sessions Judge admits he could not follow; (4) there being no sufficient evidence to establish the fact of the falsehood of the document, the legal questions of fraudulent intention, dishonesty, and the other elements of forgery, could not be decided and therefore the conviction should be set aside.—*In re* M BELLIAPA AND K. GANAPATHI 352

FRAUD: *see* COORG REVENUE CODE, 553 306
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FRIVOLOUS CAUSE BY HUSBAND: *see* CRIMINAL PROCEDURE CODE 246

FUNCTIONS OF MAGISTRATE: *see* PENAL CODE 324

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GIFT—*Immoral consideration—Construction of document.*] A deed of gift of immovable property was executed by *A* in favour of *B* who was at the time living with him as his concubine. *B* sued *A* for possession. The material portion of the deed was as follows:—"You have been living in my house. As there is no property for your maintenance in future, I give you the following movable and immovable properties as stridhana, for your maintenance after my death. * * * * * I have put you in possession of the property this day. During my life-time you are to remain in my house, and keep the said property in your possession. After my death, you will be entitled to dispose of the said property." *Held* that, on a proper construction of the document, *B* did not acquire a valid title so as to entitle her to eject *A*. *Further*, that, even assuming *B's* right to present possession admitted of no doubt, the consideration was immoral as being for future cohabitation and the gift ought not to be upheld by a court of justice.—R. VENKATASAMI PILLAY *v.* KRISHNAMA 131

GIVING TIME FOR REPAYMENT: *see* ARTIFICERS' ACT... 243

GOOD FAITH: *see* DEFAMATION 217

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GOVERNMENT INSURANCE POLICY—*Self-acquired or joint property—Right of widow.*] *Held* that, money due on a Government Policy of Life Insurance is placed absolutely at the disposal of the insured party who can nominate any person by will or other document to receive it: and a certificate of heirship in respect of such money was rightly granted to the widow of the insured. *Quære*, whether property of the kind ought to be regarded as joint family property or the self-acquired property of the deceased which in the absence of sons or grandsons his widow is entitled to inherit. A Government servant, insured under the Government scheme of Life Insurance, having died, his father applied for a certificate to enable him to receive the amounts due on the deceased's policies. The application was opposed by the widow of deceased, who herself claimed a certificate of heirship.—GAJARAJA MUDALIAR *v.* KUTIAMAL *alias* UNAMALAYAMAL... 160

GROUNDS: *see* TRANSFER ... ... 346 and 349

GROUND FOR SUCH ORDER: *see* CIVIL PROCEDURE CODE 199

GUARDIAN—*Sale by person acting as guardian—Binding effect—Substance of transaction to be looked at.*] Where a sale of minor's property was made by a person who did not in the transaction say in terms that she was acting as guardian and sold the property for the minor's benefit, *held*, that the substance of the transaction should be looked at and not the letter of the document: and as the circumstances left no doubt that the woman was the minor's guardian and sold the land to discharge a family debt, it was binding upon him.—SIDRAMA *v.* BYLI 203

GUARDIANSHIP: *see* HINDU LAW 119

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Hindu family—*Manager—Debt for family purposes—Presumption—Civil Procedure Code* (*Act XIV of* 1882) *s.* 244.] Although assets of a Hindu family in the hands of a Manager may be liable under s. 244 of the Civil Procedure Code to a decree for a family debt by order instead of by suit, it is yet necessary first to determine whether or not as a fact the debt was contracted by the previous manager for the benefit of the family; and that fact cannot be presumed.—Lakshmi Narnaiya *v.* M. Narayana 321

Hindu law—*Minor wife — Guardianship—Husband—Mother—Custom.*] A husband who is of full age is by Hindu law the guardian of his minor wife; his rights as such are superior to her mother's and no other guardian can be appointed. The practice of girls living with their parents until the age of puberty is founded upon custom and being an exception to the general rule must be specially pleaded and proved.—Akama *v.* Puttaiya 119

Hindu law—*Will by husband to wife—Alienation by wife of property devised—Cross-appeal.*] *V* made a will of certain immovable separate property to his wife *B* and she after his death conveyed the property on sale to third parties. *V R*, the brother of *V*, objected to this, claiming that *B* had only a life-estate and therefore the alienation was void and he was entitled to the property. He also filed a cross-appeal asking for costs and urging sundry objections against the decree of the lower court; and this cross-appeal was objected to on the ground that no decree had been passed against him and therefore no appeal lay except as to costs. *Held*, by the Resident's Court, that the cross-appeal was maintainable. *Also* that on the proper construction of the will, no intention was disclosed in it of expressly authorising the widow *B* to alienate; and that consequently she was, in respect of alienation, subject to the general Hindu Law of Succession, *i. e.*, she would not be able to alienate; this being the position taken by the Calcutta and Allahabad High Courts which affirm that it is only when expressly provided in the will and where there is a provision expressly empowering a widow to alienate property devised, she can do so.—Honurapa *v.* Venkataramanapa 262

Hindu will—*Validity in Mysore—Power of alienation by devisee—Stridhana.*] Although the Hindu Wills Act (XXI of 1870) is not in force in Mysore the courts have always upheld wills in those cases in which they were in conformity with Hindu Law, that is, where the subject of devise was the self-acquired or separate property of the testator which he was competent to give away by gift or otherwise during his life-time. *Further*, as to movables the legatee has absolute power of alienation; and as to immovables where the devise is coupled with an express power of alienation and the intention is clearly expressed in the will, no limitation can be placed on such power. *Also*, the persons entitled to succeed to *stridhana* after a woman's death are her own heirs and not the heirs of her husband.—Tolasa Bayee *v.* Krishnachar ... 22

Hindu widow—*Mortgage by—Rights of Mortgagee after her death—Reversioner—Stranger.*] Where land had been mortgaged by a Hindu widow and after her death the mortgagee brought a suit against a rent-paying ryot to compel the latter to pay rent to him instead of to a co-defen-

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dant who claimed the land as purchaser at a court-sale, *Held*, that although, as a general rule, a Hindu widow has only a qualified interest in property inherited from her husband, she may under some circumstances confer an absolute title on her vendee. Her right to do so can only be determined at the instance of the reversionary heir and not on the objection of a stranger who claims adversely to her and her late husband. *Further*, as against a stranger the mortgagee could succeed on establishing the widow's title to the property.—SUBBIA *v.* NARASIMA BHUTTA 94

HINDU WILL—*Collection of Debts on Succession* (*Act XXVII of* 1860.) On application by the executor of a Hindu's will for a certificate under Act XXVII of 1860 the District Judge declined to enquire into the genuineness of the will on the ground that the Hindu Wills Act was not in force in the Mysore Province. *Held* that the reason was clearly bad, as if valid it would be equally good in case of suit being brought to establish the will. On consideration of the circumstances of the case it was further *held* that the executor should have the certificate applied for.—ANNI SETTY *v.* NAGAMA... 175

HORSES IN GOOD CONDITION : *see* BANGALORE HACKNEY CARRIAGE REGULATION 227

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INDIAN COMPANIES ACT (X OF 1866) s. 4—*Unregistered Company—Mutual Loan Society—Meaning of Company, Association, Partnership—Onus—Question of fact*] The "Agent" of a Mutual Loan Society or "Cheety Company" sued on a bond, and the defendant replied that it had been given by him for money borrowed from a Society which consisted of more than twenty members and was not registered under the Indian Companies Act, 1866, s. 4 and the bond therefore could not be sued upon. *Held*, that a contract *inter se* is essential to constitute a Company, Association or Partnership under the Act It appeared from the evidence that the "Cheety Company" consisted of twenty-eight members who had to pay Rs. 2 each once a fortnight. The amount so collected was sold to and purchased by a member and he executed a bond for the difference between the sum paid to him and the sums he had paid by way of subscription. There was no evidence as to the constitution of the Society or its Rules. It was not proved that the members had held any meeting or formed a Company or entered into any contract among themselves in regard to the grant of loans or collection of debts. It was also found as a fact that "the Agent of the Company was bound to settle the claims of its members." There was absolutely no evidence to prove that the Society carried on business for gain. It did not appear that there was any source of income for which the Society as a body or any individual member thereof could have made a gain. *Held further*, that the defendant must satisfy the court that the Company was a "Com-

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pany, Association or Partnership" within the purview of s. 4 of the Indian Companies Act, and that on the facts above stated he had failed to do so. *Also*, that the question whether an unregistered Association is illegal is a question of fact which ought to be determined upon a consideration of the evidence as to the objects of the Association, its constitution and rules.—BASAVIA *v.* V. ANAPA 187

INDIAN PENAL CODE (ACT XLV OF 1860) *ss.* 193, 194—*False evidence—Retracting evidence in Sessions Court—Value of evidence—Measure of punishment.*] Where a witness for the prosecution made different statements before the Committing Magistrate and the Sessions Court on comparatively minor points, *held* that he ought to have been convicted in the alternative of having given false evidence either before the Magistrate or the Sessions Judge under s. 193 only. The contradiction being on a minor point, the sentence was reduced. Where another witness for the prosecution also retracted his evidence in the Sessions Court, but that which he gave before the Magistrate was not convincing and its weight was considerably reduced by the contradictory evidence of the only other eye-witness, it was *held* that there was no reason to imagine that a true charge broke down by the evidence he gave before the Sessions Court and such being the value of his evidence, the sentence was reduced.—THAMIA *alias* MANJA *v.* THE GOVERNMENT ... 220

INDIAN PENAL CODE (ACT XLV OF 1860) ss. 304 and 333—*Intention to kill—Knowledge that act would end in death.*] Where a man, seeing his wife and the accused committing adultery in a field, ran towards the place and finding a stone on the way flung it at and killed the deceased. *Held* that an intention to kill could not be inferred nor did the circumstances shew that the accused knew his act would end in death. The conviction was therefore altered to one under s. 323 of the Indian Penal Code and the sentence reduced to two months' rigorous imprisonment.—KARIA *v.* THE GOVERNMENT 219

INDIAN PENAL CODE (ACT XLV OF 1860) s. 52 : *see* DEFAMATION ... 217

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JOINDER OF PARTIES—*Civil Procedure Code* (*Act XIV of* 1882) *s.* 32—*Disclaimer of interest by added defendant—Joint and several contract—Cross-claim for damages—Contract Act* (*IX of* 1872) *s.* 74—*Measure of damages—Necessity for proof—Interest.*] *A* contracted to supply to *B* and *C* 1,300 maunds of jaggery a month under a penalty of eight annas a maund as damages. He supplied a smaller quantity than that contracted for and *B* and *C* declined to pay for what was supplied. *A* sued *B* only for the price of what had been supplied with interest. *B* contended that *C* must be joined as co-defendant or the suit be dismissed; and also counter-claimed for damages at eight annas a maund on the quantity not delivered. *Held*, that the contract was joint and not joint and several and that *C* should be joined, but that his non-joinder was no reason for dismissing the suit, as under s. 32 of the Civil Procedure Code the court could make an order bringing him on the record and for the pleadings to be amended. *Further*, that as *C* on being served with notice, disclaimed all interest in the suit and did not desire to be added as a party, he could not be compelled to join in the litigation and the plaintiff might proceed against *B* alone. *Held also*, that although the contract named eight annas a maund as the rate of damages, the party claiming it was bound to prove what damage he had suffered and under s. 74 of the Contract Act, the court could decree compensation for the loss actually suffered within the contract rate. Damages arising from contract are different from those arising from a tort. The former must be and can be proved particularly, although the latter in many cases cannot and must be left to the absolute discretion of the court. In the case of non or partial delivery of goods, the measure of damages is the difference between the contract price and the market rate of similar goods on the date when delivery ought to have been made and this is capable of strict proof, which as *B* had not given he could not recover damages. *A* was therefore held entitled to recover the price of the jaggery delivered and interest thereon from the date the money was claimed and default made in payment.—GOSAY GOWDA *v.* CHICKA PAPANA 99

JOINT PROPRIETORS—*Arrangement for each to take rent from specified tenants—Payment of rent by tenant to one of joint owners.*] *Held* that in a case of joint proprietorship of land, as the agreement was not contrary to the terms of the lease, the arrangement should be enforced that had been entered into for each proprietor to collect a moiety of the rents and that each should hold certain tenants as persons bound to pay rent exclusively to him. *Further*, that a tenant who *bonâ fide* paid rent to a joint owner was entitled to protection and the owners ought to be left to settle accounts between themselves.—THAMANA *v.* VENKATARAMANIA 202

JOINT AND SEVERAL CONTRACT: *see* JOINDER OF PARTIES... 99

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JUDICIAL PROCEEDING: *see* DEFAMATION 313

JURISDICTION OF CIVIL COURTS—*Pujari Rights—Code of Civil Procedure* (*Act XIV of* 1882), *s.* 11—*Muzarai Department—Chief Commissioner's Notification dated* 26*th October* 1854.] *Held* by the Full Bench (Thumboo Chetty, C. J. and Ramachendra Iyer, J. Krishna Murti, J., *dissenting*) that the Notification of the Chief Commissioner of Mysore issued on

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the 26th October 1854 not having been cancelled or repealed sufficed to vest in the Revenue officers managing Muzaroi affairs the sole control and decision of all disputes relating to *pujari* rights and under the provisions of s. 11 of the Civil Procedure Code (Act XIV of 1882) the jurisdiction of the Civil Courts in such matters is excluded, even as regards *pujaris* of private temples which are not Government institutions and which are not under the management of the Government Muzaroi Department.—APAJIA *v.* D. BEERAGOWDA 1

JURISDICTION OF CIVIL COURT—*Office of Patel—Suit for Declaration.*] Parties claiming to be heirs of a deceased patel were referred by the Deputy Commissioner to the Civil Court for establishment of their right. *Held,* that the object of the suit not being to enforce the plaintiffs' right to the office of patel, but to obtain a declaration upon which consequential relief might subsequently be obtained in the Revenue Court, it was cognizable by the Civil Court.—CHENNE GOWDA *v.* DEVE GOWDA 28

JURISDICTION : *see* PROVINCIAL SMALL CAUSE COURTS ACT 270

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" THAT ACT WOULD END IN DEATH : *see* INDIAN PENAL CODE ... 219

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LAND REVENUE CODE (MYSORE)—*Suit for enhancement of rent—Jurisdiction of Assistant Commissioner—Appeal—Limitation Act* (*XV of* 1877) *s.* 5.] A suit was filed by a *jodidar* for enhancement of rent before the Deputy Commissioner who transferred it for disposal to the Assistant Commissioner and subsequently entertaining an appeal from the decision of the latter confirmed the decree. The *jodidar* then appealed to the Government which returned his petition to him with the remark that the Chief Court was the tribunal which had power to entertain it. He thereupon made a second appeal to the Chief Court and prayed that the delay in presenting the same might be excused under the provisions of *s.* 5 of the Limitation Act. *Held* by the Chief Court that *s.* 5 of the Limitation Act applied and that the delay should be excused. *Also* that, although it was not stated in the plaint that the suit was filed under *s.* 86 of the Land Revenue Code, yet the statement of claim and the relief sought made it clear that it was a suit under that section. *Further* that, as the Assistant Commissioner who passed the decree was not in charge of the Revenue administration of the taluk in which the land was situated, he had no jurisdiction to try the suit and his decree should be quashed and the suit remitted to the Deputy Commissioner for decision under *s.* 88 of the Revenue Code. *Semble* that, if the Assistant Commissioner had jurisdiction to try the case, his decree would be the decree of the Deputy Commissioner, appealable direct to the Chief Court under *s.* 96 of the Revenue Code and not intermediately to the Deputy Commissioner.—VENKATA RAO *v.* MALLIA 143

LAND REVENUE CODE S. 41 : *see* RIGHT TO TREES 121

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LIMITATION—*Majority—Adverse possession.*] A suit for possession of land is not barred by limitation merely because more than three years have elapsed prior to its institution since the plaintiff attained his majority. There must have been twelve years' adverse possession against the plaintiff—ERA *v.* MUDAYA SETTY 133

LIMITATION ACT (XV OF 1877) S. *see* LAND REVENUE CODE 143

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LIMITATION—*Act (XV of 1877) Sch. II, Art.* 138—*Court-sale—Symbolical possession—Judgment-debtor holding over—Trespass—Cause of action.*] A purchaser of land at court-sale obtained symbolical possession from the court some nine months after the auction. The judgment-debtors remained in possession after the delivery of possession and the purchaser sued them twelve years after the date of sale but within twelve years of his having obtained possession. *Held,* that the suit was not barred by limitation under Sch. II, Art. 138 of the Limitation Act, as the judgment-debtors by remaining in occupancy after formal delivery of possession became trespassers and there was a fresh cause of action to the decree-holder as purchaser. *Also,* formal possession through the court gave the purchaser not only a fresh starting point as regards limitation, but also a fresh cause of action ; and symbolical possession of property obtained through the court was effective as against the judgment-debtor.—VENKAPA *v.* NUMBANA 61

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LIMITED COMPANY—*Winding up—Wishes of minority.*] A court exercises a wise discretion in declining to make a winding-up order when the large majority of the shareholders of a Company were opposed to it, although a minority of the shareholders allege certain omissions and irregularities which would ordinarily justify the court's interference.—R. SUBBIA SHETTY *v.* THE JAGAN MOHINI NIDHI BANK, LIMITED ... 266

LOSS OF CATTLE BY CARE-TAKER—*Liability—Negligence.*] Where one of a herd of cattle was lost upon a stormy day in a mountainous country, the care-takers were *held* not liable, there being no evidence or even allegation of any specific act of carelessness or of any general laxity on their part. The standard of circumspection and care to be expected

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was only such as a reasonable person might require; and such reasonable care not being absent, liability could not be imposed.—BALAGAI KUNDA v. T. A. WORSOP 323

LOST PROMISSORY NOTE—*Stamp—Presentation for payment—Secondary evidence.*] A Promissory Note was made at Ootacamund where the maker resided. It admittedly bore no stamps of the Civil and Military Station of Bangalore where the payee resided. A letter of demand was sent by post to Ootacamund and when suit was subsequently brought in Bangalore by the payee, he alleged that the note was lost and desired to give secondary evidence of its contents, and among other matters that it was made payable at Bangalore. *Held* (by the Resident's Court, confirming the decree of the District Court) that the evidence was not satisfactory or conclusive as to the loss of the note; and consequently secondary evidence of its contents was inadmissible. But had it been otherwise, the note should have borne a Civil and Military Station stamp at the time the letter of demand was sent to Ootacamund, as such demand was equivalent to presentation for payment; and therefore a suit could not be brought for the amount of the note even had it been lost. *Further*, that under the circumstances of the case it was doubtful if the Bangalore Courts had any jurisdiction.—B. FATHAYA CHAND v. J. WILKINSON 258

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MAHOMEDAN LAW—*Restitution of conjugal rights—Dower—Contract as to residence—Remand—Death of wife—Abatement.*] In a suit by a Mahomedan husband for restitution of conjugal rights it was pleaded in defence that a contract had been made by the husband not to remove the wife from *B* and further that he had not paid dower agreed on. *Held* that, unless the dower was exigible, its non-payment could be no defence to the suit. *Also*, that the authorities differ as to whether an agreement regarding residence such as that set up was lawful under Mahomedan Law; and the case should be therefore remanded in order to ascertain the views of a few leading Mahomedans. The wife having died pending the litigation, *held* that the cause of action did not survive and the suit should consequently abate.—KATIJABI v MOHAMED KHAN ... 129

MAINTENANCE—*Deserted wife—Wife's earnings—Reduction of maintenance.*] Where a deserted wife having obtained a decree against her husband for maintenance is subsequently granted a Government scholarship. *Held* that, such a result of her own exertions does not entitle her husband to have any reduction made in the amount of maintenance he was decreed to pay. The proceeds of the scholarship are the wife's personal earnings and are not in any way claimable by the husband. The position of a deserted wife is very different from that of a Hindu widow; and the principle on which maintenance is allotted to the latter is no guide for the case of the former. The circumstances under which modification of maintenance may be made has reference to a change in the circumstances of the husband and not those of the wife. —SUBAMA v. SUBIA 162

MAINTENANCE: *see* CRIMINAL PROCEDURE CODE ... ... 231 and 246

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MEMBERS OF UNDIVIDED FAMILY NECESSARY PARTIES TO CIVIL SUIT: *see* MUTATION OF NAMES IN REVENUE REGISTER 288

MINOR WIFE: *see* HINDU LAW 119

MINORITY—*Recital in deed—Onus—Civil Procedure Code* (*XIV of* 1882), *s.* 232—*Powers of Appellate Court.*] A recital in a document cannot bind or raise a presumption against, a person who is not a party to it. So the statement in a bond that the executant was at the time a major does not cast the onus of proving the contrary on those who challenge the fact when they are strangers to the document. *Also*, an appellate court has no power to interfere with orders of a lower court under s. 232 of the Civil Procedure Code or when declaring the right of an assignee to call in question the propriety of orders passed under the section.—VENKATARAMANIA *v.* G. CHENNABASAPA... 20

MINORITY—*Undivided Hindu family—Manager—Limitation—Continuous running of time—Limitation* (*Act XV of* 1877) *ss.* 7, 8 *and* 9; *Sch. II, Arts.* 59, 67 *and* 120—*Civil Procedure Code* (*Act XIV of* 1882) *ss.* 440, 441.] The obligee of a bond died two years after its execution, leaving as heir a minor son, on whose behalf a suit was instituted more than three years after the date of the bond, by a guardian appointed by the District Judge under the Rules relating to Minors in Mysore. *Held* by the Full Bench (Thumboo Chetty, C. J. and Krishna Murti, J., Ramachendra Iyer, J. *dissenting*) that the suit was barred by limitation under Sch. II, Art. 59 of the Limitation Act (XV of 1877). In a suit on a bond, the person entitled to sue is the person in whose favour the bond is executed, and who is competent to give a full and valid acquittance or discharge for the debt. Although the obligee may be the senior member or manager of an undivided Hindu family there can be no question as to his right to institute or maintain a suit in his own name for recovery of a debt on a bond standing in his own name and as to which there is no privity of contract between the other members of the family and the obligor or executant of the bond. Even were the father and son jointly entitled to sue on the bond, the father alone could have given a valid discharge to the debtor without the concurrence of the son and therefore the provisions of s. 8 of the Limitation Act would apply to the case. *Further*, time began to run when the deceased father was alive and under s. 9 of the Limitation Act no further disability could suspend its progress. The son cannot therefore avail himself of his minority to extend the limitation: nor can the guardian claim the benefit of s. 17 of the Limitation Act as the case is not one of the absence of a legal representative. *Also*, s. 400 of the Civil Procedure Code simply indicates the procedure to be followed and does not and cannot affect the Statute of Limitations. *Per* Ramachendra Iyer, J,—Sections 440 and 441 of the Civil Procedure Code

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prohibit a minor from taking action himself; yet the law has made no provision for safe-guarding his interests during his minority. The Rules regarding minors are applicable only to those possessed of property, so that there are many cases in which no action would be possible for the minor until his disability had ceased. To hold that all suits are barred if not filed within three years from the time the money became payable would work manifest injustice. * * * Sections 440 and 441 of the Civil Procedure Code ought to be construed so as to further the interests of minors and not to prejudice them. It seems to me that the best way to reconcile the Limitation Act with the Civil Procedure Code is to hold that time does not run against an estate, so long as the estate is not represented by a competent adult person. In this view it seems to me that the suit was not barred, as the Limitation Act does not expressly provide for it.—NANJAYA *v.* PEDANA ... 50

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MOTHER'S RIGHT TO INHERIT SON'S PROPERTY—*Unchastity.*] A Hindu mother is not debarred from inheriting her son's property by reason of her unchastity.—RAMA *v.* NANJAMA 110

MULGENI TENANCY—*Sale in execution—Application for review of judgment—Auction purchaser, a necessary party.*] In execution of a decree certain immovable property was attached. One *S* intervened claiming to be proprietor and that the tenancy was only *mulgeni*. The claim was allowed and was subsequently confirmed by proceedings in a regular suit. The *mulgeni* rights had meanwhile been sold in execution and passed to a third party. The decree holder applied for review of judgment in the regular suit. *Held*, that the auction purchaser of the *mulgeni* rights was a necesary party to the review proceedings, as the judgment-debtor had at the time of the review no interest in the property.—NAGENDRA BUTTA *v.* BASAPA GOWDA 193

MURDER—*Confession—Withdrawal—Corroborative evidence—Conviction on confession alone.*] Conviction upon a withdrawn confession is not illegal. The use to be made of such confessions is a matter of prudence rather than of law. In the absence of evidence of tutoring or ill-usage on the part of the Police and there being reliable circumstances indicating the truth of the confession, it should be acted on. The ruling of the Bombay High Court in *Queen-Empress* v. *Gharya* (I. L. R. 19 Bom., 728) preferred to those of the Madras High Court which held that a retracted confession must be supported by independent reliable evidence corroborating the confession in material particulars.—AVALA KONDA (ACCUSED) *v.* THE GOVERNMENT 224

MURDER—*Penal Code* (*Act XLV of* 1860), *s.* 300—*Confession—Criminal Procedure Code* (*Act X of* 1882) *s.* 364—*Circumstantial evidence—Con-*

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siderations for not passing death sentence.] Confession was made to a Magistrate in Hindustani and by him recorded in Canarese, the language of his Court. He justified this course on the ground of the words and defects of the "butcher" language in which the statement was made; also that he always had recorded similar confessions in the language of the Court and that his head clerk was away on a holiday. *Held*, that although it was doubtful whether the accused was in any degree whatsoever prejudiced by the statement which he heard read and which he signed, being taken down in Canarese supported by English notes, yet the law must notwithstanding be interpreted strictly. The magistrate's reasons on examination did not establish the conclusion that it was impracticable to record the confessions in the language of examination. The practice of the magistrate, the absence of a single clerk or even verbal imperfections did not constitute such a condition of impracticability as the law requires, and the confession must therefore be rejected. There being no other conclusive evidence against the second accused, his acquittal must follow the rejection of the confession. As regards the other accused, there were other facts in evidence which led to the reasonable inference that he killed or helped to kill the deceased. At the same time it being impossible to say what precise part in the act that caused death was taken by this accused or what provocation was given to him. His conviction for murder was therefore upheld, but his sentence reduced to one of transportation for life. —HUSSAIN *v.* THE GOVERNMENT 271

MUTATION OF NAMES IN REVENUE REGISTER—*Members of undivided family necessary parties to civil suit—Representation of Government in suit—Jammu tenure—Sagu tenure.*] Where the revenue authorities objected to effect a mutation of name asked for in the Revenue Register on the ground that the land being ancestral property the consent of all the members of the family represented by the applicant was required, *Held* in a civil suit brought to enforce mutation that the members of the family were necessary parties and that the Revenue officer should also be joined as represeting Government if the lands were found to *jamma*, as otherwise the decree would not be binding on the Government. The suit was therefore remanded for decision in the first place, of the question whether the land were *jamma* or *sagu* tenure and, if the former, whether the proprietors had power to sell: also for the addition as parties of all parties interested and of the Revenue officer.—K. CARIAPA *v.* CHIMACHIRA MADIYA 288

MUTCHALIKA: *see* CIVIL PROCEDURE CODE 162

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MYSORE MARRIAGE REGULATION (X OF 1894) *s.* 2—*Officiating priest—Facilitating commission of offence—Penal Code (Act XLV of 1860) s. 107, Expl.* 2.]—If a person present and officiating as priest at the marriage of an infant girl prohibited by the Mysore Marriage Regulation had reason to believe that she was an infant with the definition of s. 2 of the Regulation, he facilitated the commission of the offence and was guilty of abetment under Expl. 2 of s. 107 of the Indian Penal Code.—RAMACHENDRIA *v.* THE GOVERNMENT 245

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Partnership—*Debt due to partnership—Suit by one partner alone—Heirs of deceased partner.*] Where there were three partners in a firm one of whom had died and another had assigned to the second surviving partner his interest in a debt due to the partnership. *Held,* that the last could sue for recovery of the debt without joining the heirs of the deceased partner.—B. Mathodapa *v.* Hiranand Haste Ratha Krishna Doss Sait 201

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Penal Code (Act XLV of 1860) s. 174—*Criminal Procedure Code* (*Act X of* 1882) *s.* 487—*Trial by Magistrate of offence committed in contempt of his authority as Revenue Officer.*] Where a Magistrate tried persons under s. 174 of the Penal Code for failing to obey a summons issued by him in his capacity as Revenue Officer, *Held*, that the trials were illegal as he was prohibited by s. 487 of the Criminal Procedure Code from entertaining cases of contempt of his authority.—Rudria v. The Government 239

Penal Code (Act XLV of 1860) ss. 182 and 499—*False information—Defamation—Criminal. Procedure Code* (*Act X of* 1882) *ss.* 195, 230 *and* 537—*Knowledge that information was false meaning of reputation—Sanction—Order to prosecute—Production of proper sanction after institution of proceedings.*] A petition was presented to a Government officer, stating that *D* a clerk in his office was trying and threatening to "take forcibly possession" of certain land belonging to the petitioner and also that there was "a great contention by all powerful man to take forcibly wrongful possession." *D's* name was mentioned in the petition and there could be no doubt that the allegations referred to him. *D's* superior ordered him to prosecute the petitioner for defamation or any other charge he might be advised to bring. Later on *D* applied for permission to prosecute under s. 182 of the Penal Code and sanction was accorded him under s. 195 of the Criminal Procedure Code. Before the grant of this latter sanction, however, *D* had obtained summons from the Magistrate against the petitioner under ss. 182 and 500 of the Penal Code and during the currency of these proceedings produced the sanction granted to him under s. 195 of the Criminal Procedure Code. The petitioner was convicted under both ss. 182 and 500 of the Penal Code. *Held*, that allegations having been made which were proved false, and the tendency of which were undoubtedly to cause a public servant to use his lawful power to do something which he ought not to do if the true facts were before him, the offence under s. 182 had been committed. It was useless to urge that the petitioner did not know the information to be false. His statements were false, he made no attempt to prove them and a man must be assumed to know that which he has no *bonâ fide* reason for not knowing. *Also*, that as "reputation" means "public opinion," a complaint against *D*, a head clerk, that he had abused his powerful position to take forcibly wrongful possession of another man's property, must harm *D's* reputation and cause him injury : and therefore, as the case did not come within any of the exceptions to s. 499 of the Penal Code, the offence punishable under s. 500 had been committed. *Further*, that the order to prosecute given to the petitioner was not such a sanction as the law requires. It was not given with special reference to s. 195 of the Criminal Procedure Code; and did not comply with the requirements of that section. The Magistrate however had issued process not only under s. 182 of the Penal Code, but also under s. 500, which latter needed the sanction, and before ever the accused could be prejudiced, a proper sanction to a prosecution under s. 182 had been produced ; so that when the accused appeared to be tried, the court could take cognizance of both offences. The later sanction was therefore sufficient to support the prosecution. *Further*, having regard to ss. 195, 230 and 537 of the Criminal Procedure Code, the conviction if otherwise sound could not be reversed by reason of the omission to produce sanction at an earlier period.—Kongetti Poovia v. The Queen-Empress 329

Penal Code (Act XLV of 1860) s. 193—*False Evidence—Sanction—Criminal Procedure Code* (*Act X of 1882*) *s.* 195—*Notice.*] Previous

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notice to a person charged with false evidence is not necessary before granting sanction to prosecute, though in some cases it may be desirable. Further, an order of sanction loosely worded and that does not specify the court and the occasion on which the offence was committed, does not fulfil the requirements of section 195 (fourth paragraph) of the Criminal Procedure Code.—VENKATASIA *v.* THE GOVERNMENT ... 235

PENAL CODE (ACT XLV OF 1860) *s.* 211—*False charge—Institution of criminal proceedings—Criminal Procedure Code (Act X of* 1882) *s.* 20—*Malicious intent—Sentence—Functions of Magistrate.*] A complaint of dacoity was presented to a Second-class Magistrate, who had no cognisance, and referred the case to the police contrary to s. 20 of the Criminal Procedure Code instead of directing the complainant to present his complaint to the proper tribunal. The case, however, went ultimately to a First-class Magistrate who committed to the Sessions where the trial resulted in acquittal. On a charge under s. 211 of the Penal Code being brought against the complainant, it was urged in his defence that the presenting of the complaint to a Second-class Magistrate being *coram non judice*, was not an institution of criminal proceedings within the definition of a false charge with intent to injure and that the subsequent steps taken on the complaint were affected by the illegality. *Held*, that the complainant had set the law in motion, and this constituted institution of criminal proceedings. The proceedings initiated by him ran their whole length and it was not denied that he had made the complaint which the courts declared to be false. The finding of fact by the Sessions Court that a false and malicious charge had been brought by the accused was based on a proper appreciation of the evidence, although there was a difference of opinion among the assessors and the judge as to the precise motive that actuated the accused. A lenient sentence was passed by the Sessions Court owing to the irregularities of the police and their consequent delay. The Judicial Commissioner remarked that he should be disposed to place leniency rather on the excited feelings of the parties and the proneness to exaggerate of the society in which the accused lived. Observations on the functions of a Magistrate in passing sentence, as being different from those he performs when coming to a finding of guilty.—LABA MUTHAPA *v.* THE QUEEN EMPRESS 324

PENAL CODE (ACT XLV OF 1860) *s.* 279—*Rash or negligent driving—Onus of proving negligence.*] Where a boy sitting with out-stretched legs in a public high-way was injured by a carriage driving over his leg, but it was admitted the caraiage was driven at a moderate speed and the boy could, had he chosen, have drawn up his legs or moved out of the way. *Held*, that the burden of proving negligence rested on the prosecution and none having been shown on the part of the accused, his conviction was illegal.—*In the matter of* PEER SAB *v.* THE GOVERNMENT 233

PENAL CODE (ACT XLV OF 1860), *s.* 429—*Mischief by killing, maiming or rendering an animal useless—Deliberate intention—Punishment.*] Where a valuable horse was found in his stable in intense agony from three or four severe blows which rendered it incurably lame and useless: and it was shown that no one but the accused, who was the horse's syce and in sole charge of it, could have inflicted the injuries, *Held* that a sentence of one month's imprisonment was quite inadequate and contrary to the intention of the legislature and to public interests: and it was accordingly enhanced to six months' rigorous imprisonment.—THE QUEEN-EMPRESS *v.* SHAMON 281

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PENAL CODE (ACT XLV OF 1860) *s.* 504—*Insult—Summons Case—Criminal Procedure Code* (*Act* X *of* 1882) *s.* 250—*Compensation—Evidence.*] An offence under s. 504 of the Penal Code (Insult) is not triable as a summons case and therefore a Magistrate had no power to award compensation, under s. 250 of the Criminal Procedure Code. In making an award of compensation, a Magistrate is required to find as a fact, on evidence, that the complaint was vexatious or frivolous. Where he has recorded no evidence but acted merely on surmise his order is illegal.—*In the matter of* NANJUNDAPPA *v.* THE GOVERNMENT ... 241

PENAL CODE (ACT XLV OF 1860). *s.* 509—*Words or gesture intended to insult the modesty of a woman—Criminal Procedure Code* (*Act X of* 1882), *s.* 203.] Where a complaint disclosed facts which, if true, amounted to an offence under the Penal Code s. 509, a magistrate was *held* to be wrong in deciding that no criminal offence had been shown and in dismissing the complaint without enquiry, under s. 203 of the Criminal Procedure Code.—THE QUEEN-EMPRESS *v.* VYDYALINGAM ... 284

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- s. 52 : *see* DEFAMATION 217
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PRESCRIPTION—*Injunction—Damages—Specific Relief Act* (*I of* 1877), *s.* 54.] *A* sued for declaration of right to take water from a tank, for an injunction and for damages. It was proved that he and his ancestors had joint possession of the tank for thirty or forty years during which time they used to repair it and take water for cultivation. *Held*, that this was sufficient to support a decree for damages, against the defendants who were trespassers. *Held further* that s. 54 of the Specific Relief Act (I of 1877) did not warrant a perpetual injuction. The result of invasion of *A's* right would be failure of crops, and the actual damage could be easily ascertained. There was no allegation that the damages could not be paid nor any reason to apprehend the necessity for resort to a multiplicity of judicial proceedings.—DOORGA *v.* GIRI GOWDA 42

PRESCRIPTION—*Adverse possession—Knowledge by purchaser of defective title—Limitation.*] Where a man alleged a right in himself to land and openly dispossessed another of it, paid assessment and enjoyed it as owner for upwards of twelve years, his possession must be considered adverse and sufficient to resist a suit for ejectment against him, especially in the absence of any allegation that he had fraudulently concealed his possession. *Further*, a purchaser who obtained the property after it had been acquired by adverse possession, became lawful owner of it irrespective of his knowledge of any infirmity of the title of the previous holder. *Also*, a suit for ejectment filed eight years after the plaintiff had attained his majority and over thirteen years after the defendant had acquired title by adverse possession was barred.—RUNGAPA *v.* PATEL MELAPA 44

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PROPER REMEDY: *see* WATER ASSESSMENT 97

PROPERTY: *see* THEFT OF FISH 240

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) SCH. II, CL. 29—*Jurisdiction—Partnership—Contract Act* (*IX of* 1872), *s.* 239.] Where an Excise Contractor made a contract with a retail vendor as to the terms on which the latter was to enjoy the privilege of retail vend, *Held*, that under s. 239 of the Contract Act, there was no partnership created, as the amount to be paid for the privilege was fixed and there was no

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combination of property, labor or skill, nor any agreement to share the profits. Consequently the Small Cause Court had jurisdiction to entertain a suit upon such contract, and was not debarred from doing so by Clause 29 of the Second Schedule of Act IX of 1882.—LOGANATHAM PILLAI *v.* C. MUNISAMI NAIDU 270

PRODUCTION OF PROPER SANCTION AFTER INSTITUTION OF PROCEEDINGS: *see* PENAL CODE 329

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PURCHASER: *see* CIVIL PROCEDURE CODE ... ... 29 and 179

PURCHASE BY ONE PERSON FOR ANOTHER—*Lien for unpaid purchase money——Lien for monies expended in obtaining possession—Interest.*] *A* purchased a house in his own name but for and on account of *B;* the latter having failed to pay all the purchase-money the balance was paid by *A,* who also expended further sums in suing to recover possession of the house. *Held,* that he was entitled to a lien on the property for all the monies, both the balance of purchase-money and that expended in litigation and *further* that although there was no agreement to pay interest he was entitled to compensation as the circnmstances did not show he intended to lay out money for the plaintiff's benefit without recompense. His claim for interest was therefore also allowed.—YELAPA *v.* MOOTE NANJIA 125

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RAZINAMA DECREE—*Setting aside—Consent to irregular procedure—Civil Procedure Code* (*XIV of* 1882), *s.* 244.] A *razinama* decree cannot be set aside without a fresh suit. Mere consent or application of the parties cannot confer jurisdiction upon the court to take further evidence subsequent to a decree which not having been appealed against became final. If there were any questions relating to the execution of the *razinama* decree they would have to be determined under s. 244 of the Code of Civil Procedure.—SUBANA *v.* NANJUNDIA 124

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REGISTRATION ACT (*III of* 1887) *s.* 82 (*c*)—*Penal Code* (*Act XLV of* 1860) *s.* 205—*False personation.*] A son who personated his father for the purpose of registering a document executed by the latter who was very old and ill and sent him to present the document, *held* rightly convicted under s. 82 (*c*) of the Registration Act (III of 1877), he having stated he was the executant of the document and endorsed the document to that effect.—DEVE GOWDA *v.* THE GOVERNMENT 234

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" " , 1887: *see* BANGALORE HACKNEY CARRIAGE REGULATION... 227

REGULATIONS, MYSORE—

1883—I, s. 16: *see* CIVIL COURTS REGULATION 215

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RETRACTING EVIDENCE IN SESSIONS COURT: *see* INDIAN PENAL CODE ... 220

REVENUE SALE—*Subsequent purchase—Title*]. The alleged title of a purchaser of immovable property under a purchase subsequent to a Revenue sale cannot be recognised, so long as the sale remains uncancelled.—PILAPA *v.* NANJUNDAPA 200

REVERSAL OF DECREE ON APPEAL OF ONE PARTY AGAINST OTHERS WHO DID NOT APPEAL: *see* SUIT FOR IMMOVABLE PROPERTY 67

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RIGHT TO TREES—*Payment of malki assessment—Power of Revenue Authorities to transfer right to trees—Land Revenue Code, s.* 41.] Where the owner of land had been in enjoyment of a tree standing thereon for some forty years, the mere fact that at the Survey Settlement the tree was included in the land of another man who had for three years been allowed to pay the *malki* assessment in respect of it, did not and could not confer any right upon the latter. Under the Land Revenue Code, s. 41, Government has power to transfer to the occupant of land the right to trees thereon under certain conditions, but no power is given to confer such rights on persons who are not occupants of the land.—BYRAPA *v.* GIRIGANA 121

RIGHTS OF MORTGAGEE AFTER HER DEATH: *see* HINDU WIDOW 94

RULES OF "DAMDUPAT"—*Interest in suits between Hindus—Interest paid before institution of suit—Transfer of Property Act* (*IV of* 1882), *s.* 76.] *Held*, that, in suits between Hindus in Coorg, the rule of *damdupat* which disallows interest greater in amount than the principal, should be applied. The ruling of the High Court of Madras in *Kakarlapudi* v. *Uppalapudi* (I. L. R. 1 Madras, 5) followed. *Further*, that interest paid before the institution of the suit should not be excluded. *Also*, that the plaintiff was entitled under s. 76 of the Transfer of Property Act to exclude from the account of profits enjoyed by him any sums paid by him on account of the defendant.—BRAHMIN MANJIAH *v.* GOWDAGAL KUNJANNA 311

RULES FOR REMUNERATION OF PATELS AND SHANBOGUES—*Patel—Gumasta—Potigay—Remuneration of acting incumbent—Private agreement with substantive office-holder—Agreement against public policy—Contract Act* (*IX of* 1872) *s.* 23.] A Patel being incapacitated by age and infirmity from performing his duties efficiently a *Gumasta* was on his application appoined, without any special conditions.The Patel had made a private agreement with the *Gumasta* that the latter should take only two-thirds of the *potigay* or official remuneration, the remaining one-third to be paid to the Patel. *Held* that as the "Rules relating to the Remuneration of Patels and Shanbogues" provide that the entire remuneration shall be paid to the officiating incumbent of an office for his support and that the same is his exclusive perquisite on which no other member of the family or co-sharer shall have any claim, an agreement such as that in question was contrary to public policy and incapable of enforcement and void under s. 23 of the Contract Act.—KEMPE GOWDA *v.* KADAY GOWDA 177

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SETTING ASIDE: *see* RAZINAMA DECREE 124

" " EXECUTION SALE: *see* CIVIL PROCEDURE CODE 179

SHANBOGUE—*Potigay—Inalienability.*] The remuneration (*potigay*) payable to a Shanbogue is his exclusive perquisite in which no other member of the family has any claim: and it makes no difference that an agreement to share it was made when the family property was divided.—SHANBOGUE RAMAPA *v.* CHENAPA 134

SMALL CAUSE COURT: *see* CIVIL COURTS REGULATION 215

SMALL CAUSE SUIT—*Suit for rent—Khadim tenancy—Possession—Amendment.*] A suit for rent, brought on the small cause side of the court, was dismissed by the Munsiff on the ground that the defendant was a *khadim* tenant and that the document on which the suit was brought was an agreement for enhancement of rent and was not registered as required by the Land Revenue Code. *Held*, that the substantial question involved being whether the defendant was a *khadim* tenant, the plaintiff's right to the land, which was in possession of the defendant, was involved: and the suit should not be tried as a small cause. In ordering the suit to be brought on the ordinary file and tried as a regular suit, the court directed that if necessary the plaintiff should be permitted to amend the plaint so as to include a prayer for possession of the land.—MALAPA *v.* PUTI MADA 196

SPECIAL DAMAGE: *see* DEFAMATION 138

SPECIFIC RELIEF ACT (I OF 1877), *s.* 54: *see* PRESCRIPTION 42

STAMP: *see* LOST PROMISSORY NOTE 258

STAMP ACT (*I of* 1879) *Schedule I, Art.* 21—*Sale—Conveyance.*] An instrument purporting to be a sale-deed of fuel for a fixed sum, is not an agreement to sell but a conveyance chargeable with duty under Sch. I, Art. 21 of the Stamp Act.—VENKATESAPA *v.* RAMAPA... 212

STAMP ACT (*I of* 1879), *ss.* 34, 39 *and* 41—*Recovery of money paid for stamp duty and penalty—Conclusiveness of certificate under s.* 39 *of the Stamp Act—Construction of document—Parties.*] In a suit to recover the amount of stamp duty and penalty levied on a document produced in evidence, *Held* that, although the document was clearly an agreement and not a bond, the certificate given under s. 39 of the Stamp Act being by s. 41 of the same Act conclusive as to the amount recoverable, the sum named in it must be decreed, although it was calculated on a wrong construction of the document as a bond. *Also*, there was no non-joinder of parties, as the defendant was the sole executant of the document, the suit against him alone was maintainable and his partners need not be joined even though the document related to partnership business.—A. OOSMAN SAIB *v.* A. MAHOMED KHAN 46

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STAMP ACT (*I of* 1879), *ss.* 34, 39 *and* 41—*Construction of document—Parties.*] A document, attested and containing an obligation to pay money *held* to be a bond and not merely an agreement. *Also*, the executant of the document only was rightly sued for recovery of stamp duty and penalty paid on the document, and his partners in business need not be joined.—AVOR OOSMAN SAIB *v.* ATHIGUNDI MAHOMED KHAN. 49

STAMP ACT (*I of* 1879)—*Submission to arbitration—Agreement not otherwise provided for.*] A document divisible into two parts, of which the former is a submission to arbitration and the latter an agreement made in pursuance of the award given under the arbitration, is chargeable with two duties of eight annas each, *i. e.*, as an award and as an agreement not otherwise provided for.—VENKATACHELUM PILLAY *v.* PATEL THIME GOWDA 213

STRANGER : *see* HINDU LAW... 94

STRIDHANA : *see* HINDU WILL 22

SUBMISSION TO ARBITRATION : *see* STAMP ACT 213

SUBSEQUENT PURCHASE : *see* REVENUE SALE 200

SUBSTANCE OF TRANSACTION TO BE LOOKED AT : *see* GUARDIAN 203

SUCCESSION CERTIFICATE—*Act XXVII of 1860—Suit to have certificate cancelled and for declaration of right to monies.*] A certificate under Act XXVII of 1860 to collect the debts due to her deceased husband was granted to a widow who was opposed by the brother of the deceased on the ground that the debts (monies in bank deposit and due on bonds) were the self-acquisition of the latter. The brother then sued the widow for cancelment of the certificate and for a declaration of his right to the monies; and it was held by the District Court that the monies were the self-acquisition of the deceased and therefore his brother was entitled to them less a sum for which the widow had a lien upon them for maintenance. *Held* by the Chief Court that the suit was not maintainable. The brother could have appealed against the grant of the certificate, but not having done so the order granting it had become irrevocable and could not be cancelled by suit. *Further*, he was entitled to, if anything, a decree for a specific sum and not to a mere declaration of right, a suit for which was therefore inadmissible.—TOOLASI BOYEE *v.* HARIACHAR 111

SUIT : *see* USUFRUCTORY MORTGAGE 88

SUIT AGAINST DEPUTY COMMISSIONER : *see* WATER ASSESSMENT... ... 97

SUIT AGAINST PUBLIC OFFICER—*Damages—Cause of action.*] The Public Works Department made a road to a village, the cost of which was levied from the villagers. Subsequently the Executive Engineer considered a drain by the side of the road necessary, the making of which was complained of by the villagers: and they sued the Executive Engineer and two of his subordinates for its removal or for damages on account of constructing it. No imputation of negligence or malice was made. *Held*, there was no cause of action. The Executive Engineer was the best judge of the requirements of the situation and if he committed an error of judgment, he might be set right by his departmental superior: but no suit would lie against him personally. The plaintiffs had not proved their claim for refund of money paid for making the road. There was no failure of consideration, as a road had been made: and there was no agreement that if it were not made in a particular manner the cost should be refunded.—PAYASAM HANUMUNTHU *v.* Y. SRINIVASA RAO 91

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SUIT BY ONE PARTNER ALONE: see PARTNERSHIP 201

" FOR DECLARATION: see JURISDICTION OF CIVIL COURT 28

SUIT FOR DIVISION OF FAMILY PROPERTY—*Razinama—Decree in favour of defendant not party to razinama—Separate execution for respective shares—Decree-holder—Civil Procedure Code* (*Act XIV of* 1882) *s.* 2—*Powers of court in suit for partition.*] A decree was passed for division of family property on a *razinama* filed by the parties, whereby one-fourth share was given to the plaintiff and to each of three defendants. Separate applications were made for execution and from the orders on these, appeal was made, the contention being that one of the defendants not being a party to the *razinama* the decree in his favour was bad in law and that separate execution should not have been granted for possession of the respective shares decreed to each party. *Held* (1) that whether the decree was or was not in accordance with the *razinama* was a question that ought to have been raised by appeal from the decree itself and was not a point arising in execution; (2) that the decree having awarded to each party a fourth share of the property, each is a decree-holder as defined by s. 2 of the Civil Procedure Code and each entitled to execute the decree. *Also* it is quite competent to a court in a suit for partition to make an award in favour of each coparcener: and if a defendant desires to have his share ascertained and separated, the court is not bound to refer him to a separate suit.—SANTHARAJA SETTY *v.* PUTTA SETTY 155

SUIT FOR ENHANCEMENT OF RENT: see LAND REVENUE CODE 143

SUIT FOR IMMOVEABLE PROPERTY—*Onus on plaintiff—Production of document in possession or power of opposite party—Notice—Evidence Act* (*I of* 1872) *ss.* 65(*a*) *and* 66—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 544—*Reversal of decree on appeal of one party against others who did not appeal.*] *A* sued to recover immoveable property alleged to have been sold to him by *B*. *B's* title was denied by *C*, *D* and *E*, and the last two claimed to be in possession under a sale to them by *C*, which had been effected of two separate portions of the property, one to each. The court of first instance held that *A* had proved his case and gave him a decree for possession. *D* alone appealed and claimed under s. 544 of the Code of Civil Procedure, to have the decree set aside wholly so as to effect *A's* right to recover possession of even the share separately sold to *E*. *Held* (by the Division Bench), that, as the evidence went no further than to prove joint possession by the plaintiff and contesting defendants, a decree could not be given to the plaintiff, who must recover on the strength of his own title and not upon the weakness of that of the defendants: therefore the decree against the appealing defendant must be reversed. *Also*, although a document required by one party be in the possession or power of the opposite party, notice must be given to produce the document; otherwise secondary evidence of its contents cannot be given under ss. 65(*a*) and 66 of the Evidence Act. *Held* further by the Full Bench (THUMBOO CHETTY, *C. J.*, RAMACHENDRA IYER and KRISHNA MURTI, *JJ.*), that under s. 544 of the Civil Procedure Code the court had power to reverse the whole decree and should do so because it proceeded upon a ground common to all the defendants and moreover was a decree that could be executed only jointly against them and not a separate decree against each so far as his separate share only was concerned.—PRABHAVIA *v.* RAMAKRISHNAPA... 67

SUIT FOR RENT: see SMALL CAUSE SUIT 196

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SUIT TO HAVE CERTIFICATE CANCELLED AND FOR DECLARATION OF RIGHT TO MONIES: *see* SUCCESSION CERTIFICATE 111

SUIT TO SET ASIDE DECREE—*Alleged fraud—False affidavit—Civil Procedure Code* (*Act XIV of* 1882), *s.* 108.] Suit was brought to set aside an *exparte* decree on the ground it had been obtained by fraud. The fraud was alleged to consist of false statements made in an affidavit upon which substituted service had been granted. *Held*, that if the allegations on which it was sought to have the decree set aside were true they would be good grounds for an order under s. 108 of the Civil Procedure Code; but could not be taken as sufficient to support a suit. To allow a suit, to set aside a decree alleged to have been obtained by perjury and so forth, would be to encourage a multiplicity of suits and put an end to finality in litigation. It might be different were the defendant against whom the decree was given absolutely without a remedy; but an appropriate remedy being provided by s. 108 of the Civil Procedure Code, a separate suit could not be maintained.—VENKATRAMANAYA *v.* SHAMANA... 35

SUMMARY TRIAL: *see* ARTIFICERS' ACT 340

SUMMONS CASE: *see* PENAL CODE 241

SURETY: *see* CIVIL PROCEDURE CODE 267

SYMBOLICAL POSSESSION: *see* LIMITATION ACT 61

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THEFT—*Theft in a railway carriage—Indian Penal Code* (*Act XLV of 1860*) *ss. 379, 380.*] A railway carriage does not come within the definition of a building used as a human dwelling within the meaning of s. 380 of the Indian Penal Code. While therefore, holding that the circumstances of the case proved that the accused had committed theft from a railway carriage, the conviction was altered from one under s. 380 to one under s. 379.—RANGA *v.* THE GOVERNMENT 218

THEFT IN A RAILWAY CARRIAGE: *see* THEFT 218

THEFT OF FISH—*Property—Evidence.*] A person cannot be convicted of theft of fish from a tank, merely because the Municipality had exhibited a notice prohibiting people from fishing therein. There being nothing to show that the fish in the tank was in the possession of the Municipality who had instituted the prosecution, there could be no dishonest removal of property "out of the possession of any person without that person's consent."—PUTA *v.* THE GOVERNMENT 240

TIME ALLOWED FOR APPLICATION TO BE DECLARED INSOLVENT: *see* CIVIL PROCEDURE CODE 162

TITLE: *see* EJECTMENT 32

REVENUE SALE 200

TITLE IN PLAINTIFF: *see* EJECTMENT 17

TORT—*Interference with toddy-contractor's rights—Damages.*] A license to open a toddy shop in a village within a circle already granted to *A* was by mistake issued to *B* who, notwithstanding *A's* protest, opened a shop and sold toddy in the village until his license was cancelled. *Held*, that there was an invasion and infringement of *A's* right with consequent loss to him caused by *B;* and the proper measure of damages would be the amount received by *B* from sales of toddy less his expen-

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ses: so that he should be prevented from making a gain by his wrong. The plaintiff is not bound in all cases to prove his loss; but in cases of tort where there are aggravating circumstances damages may be awarded so as to operate as a punishment.—SESHACHELLA MOODELLIAR *v.* PUTANA 38

TRANSFER—*Grounds—Criminal Procedure Code* (*Act X of* 1882) *s.* 526—*Penal Code* (*Act XLV of* 1860) *ss.* 182 *and* 500.] On an application by accused, under s. 526 of the Criminal Procedure Code, for transfer of a case of giving false information (Penal Code, s. 182) and Defamation (Penal Code, s. 500) on the grounds of alleged intimacy between the magistrate and the complainant and antipathy of the former to the accused, *Held* that looking at the personal charges of unfairness, the vague grounds of comradeship with one party and alleged antipathy to the accused and the unsupported allegation that the magistrate's evidence is required; looking also at the unusual safeguards which the law provides in charges of defamation or of offences that require sanction, the grounds brought forward were not sufficient to warrant a transfer.—*In re* KONGETTI POOVIA 346

TRANSFER—*Grounds—Criminal Procedure Code* (*Act X of* 1882), *s.* 526(*a*) *and* (*e*).] Application was made by an accused, under s. 526 of the Criminal Procedure Code, for transfer of a case on the grounds (1) that the magistrate had shown some avidity in taking the case on his own file when it was cognizable by a second-class magistrate; (2) that the magistrate had expressed himself in court at first in favour of the accused and then acted in a diametrically opposite manner and granted repeated adjournments to the prosecution; (3) that a pleader for the prosecution had visited the magistrate and the accused was charged a day or so after. *Held* that under s. 426(*a*) of the Criminal Procedure Code it would be impossible to order a transfer: but under s. 426(*e*) a transfer might be expedient. The question under that clause would be whether there were any circumstances which might reasonably lead the accused to believe that the magistrate had, to some extent, prejudged the case. But as the case was one which *primâ facie* raised doubts as to whether or not a crime had been committed, and the magistrate had so far acted according to law, it could not be held expedient to interrupt the ordinary course of justice or weaken the confidence of the public in the courts of law by removing a case from the magistrate because the accused, whether from a guilty conscience, nervous temperament, or confidence in bazaar rumours or other causes, considered he might be prejudiced because on a certain day a certain pleader visited the magistrate and was then surmised to have said to him something or another.—*In re* K. PONAPA 349

TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 88 AND 90—*Civil Procedure Code* (*Act XIV of* 1882) *ss.* 2 *and* 242—*Decree—Order in execution—Mortgage—Personal execution.*] The decree in a mortgage suit having been transferred for execution, application was made for arrest of the defendant and it was objected that the decree was only for sale of the mortgaged property within the meaning of s. 88 of the Transfer of Property Act; that the defendant was not personally liable; and to make him so the plaintiff should obtain a decree under s. 90 of the same Act. The court that passed the decree had previously made an order directing execution against the person of the defendant which order was followed by another to the same effect by the Registrar of that court. *Held*, that the order of the Court and Registrar having the force of a decree under s. 2 of the Civil Procedure Code should be regarded as a

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decree within the meaning of s. 90 of the Transfer of Property Act, and *Further* under s. 242 of the Civil Procedure Code the legality of that order could not be questioned by a court executing the decree.—THE COMMERCIAL AND LAND MORTGAGE BANK, LIMITED *v.* C. SABAPATHI IYA... 165

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 51—*Compensation for improvements—Trespasser—Bonâ fide holder under defective title—Notice.*] *D* purchased certain immovable property, which had previously been sold by another vendor to *R*, and having obtained possession succeeded for some time in resisting the attempts of *R* to evict him. When at last *R* had obtained a final decree for the unconditional recovery of the land, *D's* claim for set-off for improvements and a right of entry to gather crops being rejected, *D* filed a suit for compensation for improvements he had effected to the land while in possession, *Held* that *D* was but a trespasser in wrongful possession holding adversely to the true owner; and even if he had paid moneys for the benefit and improvement of the estate on the *bonâ fide* supposition that he could prove his title, that would not alter the fact that he was a trespasser. Section 51 of the Transfer of Property Act deals with improvements made by *bonâ fide* holders under a defective title, but *D* knew from the first that his title was disputed and that in fact he had no *bonâ fide* title at all, and was only a trespasser. *Further*, the legal action taken by *R* in previous suits was an adequate hoisting of the signal of danger; and although a challenged title is no doubt not equivalent to a defect in the title challenged, yet, where a party steps in between a prior purchaser who has rejected his purchase, and girds up his loins and makes haste to improve a property to which it is proved he has not a shadow of a title, the law will be slow to give him the possession of a "transferee believing in good faith that he is absolutely entitled thereto."—S. D. RAMA RAO *v.* K. DODANA SHETTY 301

TRANSFER OF PROPERTY ACT: *see* RULE OF DAMDUPAT 34

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UNDIVIDED HINDU FAMILY: *see* MINORITY 50

UNREGISTERED COMPANY: *see* INDIAN COMPANIES ACT 187

UNREGISTERED DEED—*Priority of registered deed—Registration Act (III of 1877) s. 50—Transfer of Property Act (IV of 1882) ss. 53 and 54—Fraud—Contract Act (IX of 1872) s. 17.*] *A* sold land of the value of Rs. 100 to *B* by unregistered deed; and *B* mortgaged the same land to *C* by a properly registered document, on which the latter subsequently obtained a decree and attached the land in execution. It was not however brought to sale and the execution proceedings were struck off the file. After this *A* sold the land again to *D* by registered deed. It appeared that *D* was cognisant of the previous sale to *B* and was a witness on the mortgage by the latter to *C*. *Held* that "Fraud" being defined by the Contract Act (s. 17) as "any act fitted to

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deceive," *A* must be taken to have acted fraudulently in that, having sold the land for a consideration though without executing a registered deed, he subsequently sold it again to *D* under a registered deed. *Also*, that *D* was a party to the fraud inasmuch as he bought the land knowing that it had been previously sold by *A* to *B*. *Further*, the effect of the second sale being therefore to defraud under s. 53 of the Transfer of Property Act, the party defrauded being *C*, who succeeded in interest to *B*, *D* was held debarred, by reason of this fraudulent purchase, from coming into court to sue for a declaration that the land was not liable to be sold in execution of the decree held by *C*. The principle laid down in *Ram Autar* v. *Dhanauri* (I. L. R. 8 All. 540) *followed*, that a man cannot "on the strength of his own fraud, pray in aid of the provisions of the Registration Law to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this aspect of the matter such a document would not be a document in the sense of s. 50 of the Registration Act."—ABDUL GANI SAB *v.* T. B. KRISHNASAMI NAIDU 297

UNSTAMPED PROMISSORY NOTE—*Right of suit—Consideration—Admission.*] In a suit upon an unstamped promissory note, the defendant admitted the claim but pleaded discharge and denied liability to pay interest. *Held*, that it was not necessary to put the document in evidence as its genuineness and the consideration were admitted and the claim for interest was based not upon the document itself but upon an independent oral contract.—SUBARAYA *v.* JAYANA 172

USUFRUCTUARY MORTGAGE—*Agreement for absolute sale—Waiver—Improvements—Interest on kandayem paid by mortgagor.*] In a deed of usufructuary mortgage there was a condition that on failure of due payment of the mortgage amount, the mortgagee might enjoy the land as if it was sold: to this condition were appended the terms that the mortgagor should tender a resignation of the land in favour of the mortgagee and cause mutation of names to be made in the Revenue Register. There was failure by the mortgagor to pay the mortgage money on due date, but there had been no attempt to get any mutation of name nor any request or demand on the part of the mortgagee. *Held*, that under such circumstances, there had been a waiver of the breach of condition and no intention of enforcing the agreement for making the conditional sale absolute: the mortgagor's right to redeem remained intact and a sale by him to a third party after the breach and subject to the mortgage was valid. *Held also*, that a usufructuary mortgagee in the absence of any stipulation in the mortgage deed is not entitled to claim the value of improvements because he has enjoyed the whole proceeds without accounting for the same. *Also*, the mortgagor being bound to pay *kandayem* and having failed to do so, should in fairness, pay interest by way of damages on *kandayem* paid by the mortgagee.—S. NARASIMIA *v.* PUTTA NANJAMA 63

USUFRUCTUARY MORTGAGE—*Redemption—Second mortgage—Suit—Civil Procedure Code (Act XIV of 1882), s. 43.*] In a suit for redemption of a mortgage, the mortgagee claimed to be repaid monies expended by him in payment of *jodi* due to Government. The claim was resisted on the ground that in a previous suit upon a second mortgage between the same parties executed subsequently to the first, no claim on account of the *jodi* had been put forward and the mortgagee was therefore barred from now urging it, under s. 43 of the Code of Civil Procedure. *Held*, that the mortgagee was not barred, Section 43 of the Civil

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Procedure Code does not deprive a defendant of any defence justly open to him, though it bars a fresh suit. In the present case the obligation to pay *jodi* was not provided for by the document sued on; and a decision either way would not contradict or be opposed to its terms. The mortgagee was therefore entitled to repayment of what he had paid for *jodi*.—CHENA SHETTY *v.* VENCATASA BHATTA 88

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VALIDITY OF HINDU WILL IN MYSORE : *see* HINDU WILL 22

VALUE OF EVIDENCE ; *see* INDIAN PENAL CODE 220

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WAIVER : *see* USUFRUCTUARY MORTGAGE 63

WATER ASSESSMENT—*Right to adequate supply of water for cultivation—Damages—Suit against Deputy Commissioner—Cause of action—Proper remedy.*] A land-owner paying wet assessment upon his land sued the Deputy Commissioner of the District on the ground that neither the Public Works Department nor the Revenue Department supplied him with water for cultivation whereby he was unable to raise any crop, and he claimed as damages the value of the produce he might have reaped had the Deputy Commissioner supplied him with water. There was no allegation of any tortious act by the Deputy Commissioner. *Held*, there was no cause of action. The imposition of wet assessment on a field does not imply a contract between the owner of the field and the Government obliging the latter to supply water to the former and for breach of which a suit would be a matter of course. It does not impose upon the Government an absolute duty the omission to perform which carries a liability to pay damages. The proper remedy is to appeal to the Government to revise the rate of assessment or make better arrangement for distribution of water.—THAMIA *v.* DEPUTY COMMISSIONER, MYSORE DISTRICT 97

WHIPPING ACT (VI OF 1864) ss. 2 AND 3—*Same offence—Abetment.*] It is only when a prisoner has been previously convicted of the *same* offence, being one specified in s. 2 of the Whipping Act, that he can under s. 3 of the Act be punished with whipping in addition to other punishment. Abetment is not one of the offences specified. A conviction for offences under ss. 380 *or* 411 of the Penal Code is not the same as a subsequent conviction for offences under ss. 457 and 380 of Penal Code: and a sentence of whipping in addition to rigorous imprisonment for the latter, is therefore improper.—LEWIS ROZARIO *v.* THE GOVERNMENT ... 222

WIFE'S EARNINGS: *see* MAINTENANCE 162

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WISHES OF MINORITY: *see* LIMITED COMPANY 266

WITHDRAWAL OF CHARGES: *see* CRIMINAL PROCEDURE CODE 283

WITHDRAWAL OF SUIT WITH LIBERTY TO BRING A FRESH ONE: *see* CIVIL PROCEDURE CODE 199

WORDS OR GESTURE INTENDED TO INSULT THE MODESTY OF A WOMAN: *see* PENAL CODE 284

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